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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 748

HARRY F. SINCLAIR,
HENRY MASON DAY,
WILLIAM J. BURNS,
W. SHERMAN BURNS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Certificate from the Court of Appeals of the District of Columbia.

BRIEF OF APPELLANT HARRY F. SINCLAIR

JURISDICTION

This cause is here for consideration by this court pursuant to the order of this court made under Section 239, Judicial Code, as amended (U. S. C. A.,

tit. 28, Sec. 346), directing that the entire record be sent up by the Court of Appeals of the District of Columbia (R. 871), following a certification by that court of five certain questions upon which it requested instructions by this court (R. 864).

STATEMENT OF THE CASE

The appellant Harry F. Sinclair and the appellants Henry Mason Day, William J. Burns and W. Sherman Burns were tried and convicted in the Supreme Court of the District of Columbia upon a petition which sought to charge the appellants with contempt of court within the meaning of Sec. 268 of the Judicial Code. After hearing, the court adjudged the appellants guilty and sentenced the appellant Harry F. Sinclair to imprisonment in jail for six months (R. 860); the appellant Henry Mason Day to imprisonment in jail for four months (R. 859); the appellant William J. Burns to imprisonment in jail for fifteen days (R. 859), and sentenced the appellant W. Sherman Burns to pay a fine of $1,000 (R. 858). From the judgment of the court, an appeal was taken to the Court of Appeals of the District of Columbia by the respondents below, and argument was had thereon on February 7 and 8, 1929. (R. 863). Thereafter, on February 20, 1929, the Court of Appeals certified five certain questions to this court upon which it requested instructions (R. 864), following which this court on March 8,

1929 (R. 871) directed that the entire record be sent up. The cause is now presented on that record for review and decision by this court.

The statute under which summary proceedings may be had, and punishment administered as and for a contempt of court, is Sec. 268 of the Judicial Code (U. S. C. A., tit. 28, Sec. 385), which provides as follows:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

Petition of the United States

The petition of the government alleged that on October 17, 1927, in the Criminal Division of the Supreme Court of the District of Columbia, the case of United States v. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324, came on for trial before the Honorable Frederick L. Siddons, Associate Justice of said court, and that certain jurors named in

the petition (R. 2) were selected and sworn as jurors. That the government from that time was in course of presenting its evidence in said cause until November 2, 1927, on which last-mentioned date the jury was finally discharged from further consideration of said cause and a mistrial declared because of the fact that sworn charges had been made against juror Edward J. Kidwell, Jr., to the effect that said juror, while the said trial was in progress, to-wit, on the 29th day of October, 1927, outside of the court room and at No. 411 4½ Street, Southwest, in the City of Washington, had made remarks, in the presence and within the hearing of J. Ray Akers and Donald Kay King, concerning his attitude and intended action as a juror aforesaid towards the issues on trial in said cause, and also that there were a large number of operatives of the William J. Burns International Detective Agency, of New York, then engaged in the District of Columbia since October 18, 1927, in a close, intimate, objectionable and improper surveillance and investigation of the jurors and the relatives, neighbors and friends of said jurors. (R. 3).

The petition further alleged that when the jurors were sworn in, on October 18, 1927, the respondent Sinclair directed the respondent Day and the respondent Clark, each of whom was connected with certain corporations which the said respondent Sinclair controlled by stock ownership, to proceed to the City of Washington and to engage the services

of the William J. Burns International Detective Agency and to supervise the operatives of said agency and receive reports and forward the same to respondent Sinclair. (R. 3).

The petition alleged that the object of all of this was

> "To spy upon said jurors and each of them, to bribe, intimidate and influence said jurors and each or any of them, and to do anything calculated to interfere with and impede said jurors and each of them in the unbiased discharge of their duties in the trial of said course, and to influence, pervert, impede, and prevent said jurors in the discharge of their duties as jurors, and to impede, pervert, and prevent the due administration of justice in said court in the trial of said criminal prosecution, either by corruptly influencing said jurors to decide the issues of said prosecution in favor of the defendants therein, or to disagree as to said issues, by unlawfully spying upon the said jurors and each of them for the purpose of concocting false charges against one or more of the said jurors, in case such a course should seem advantageous to said defendants in said cause, with a view of bringing about a mistrial of the cause aforesaid; or otherwise accomplish such purpose." (R. 3, 4).

The petition further alleged the employment of the William J. Burns International Detective Agency by respondent Day, the appearance of fifteen operatives in the employ of the William J.

Burns International Detective Agency in the City of Washington and the assignment of said detectives to the work of shadowing the jurors in said cause and that said duties were performed by said operatives up to and including the 2d day of November, 1927. (R. 4).

The petition further alleged that on November 3, 1927 (after the mistrial had been declared), W. Sherman Burns, an officer of the William J. Burns International Detective Agency, procured the making of a false affidavit purporting to show that a representative of the United States Department of Justice had approached and held conversation with juror Glasscock; and the petition further alleged that respondent William J. Burns and respondent W. Sherman Burns, knowing the falsity of such affidavit, procured the submission of it to Honorable Frederick L. Siddons, Associate Justice of the Supreme Court, intending thereby to provide evidence, such as it was, that the United States of America, through one of its employes, had tampered with said juror in said cause. (R. 5).

The petition further alleged that the operatives investigated encumbrances upon the home of the juror Kern, in the City of Washington, at the direction of Manager Ruddy, and reported in writing the result of their investigation. (R. 5, 6).

The petition further alleged that an investigation was made by the said operatives, under the direction of Manager Ruddy, of the brother and father

of the juror Kidwell, and that reports were made with respect thereto. (R. 6).

Upon the filing of the petition, the court issued a rule against the respondents to show cause why they should not be adjudged in contempt of court. (R. 8).

Answer and Motion to Dismiss, of Respondent Sinclair

The respondent Sinclair, in addition to answering specifically the allegations of the said petition, challenged the legal sufficiency thereof, by way of a motion to dismiss, upon the following grounds:

> "1. The said petition does not allege facts sufficient in law to confer jurisdiction upon this court to adjudge the respondent guilty of contempt.
>
> "2. The said petition fails to allege facts sufficient as matter of law to charge this respondent with contempt of court.
>
> "3. The facts alleged in said petition are insufficient as matter of law to charge misbehavior by this respondent in the presence of the court or so near thereto as to obstruct the due administration of justice.
>
> "4. That said petition does not allege facts showing or even tending to show that the respondent has been guilty of acts or conduct in any wise impeding or tending to impede the due administration of justice.

"5. This court is without jurisdiction to try this respondent or to adjudge him guilty of contempt of this court upon the allegations of said petition.

"6. The court is without jurisdiction to entertain said petition or to make any adjudication thereon, because said petition is lacking in necessary and essential allegations showing that this respondent has been guilty of misbehavior in the presence of the court or so near thereto as to obstruct or impede the due administration of justice." (R. 9).

Specifically answering the petition of the government, respondent Sinclair admitted the fact that the jury had been duly selected and sworn and the case was on trial and the United States was in course of presenting its evidence and it so continued up to and including the 31st day of October, and that on the 2nd day of November, 1927, a mistrial was declared. (R. 9, 10).

Respondent Sinclair further admitted that on the 1st day of November, 1927, certain charges were made by the counsel for the United States, relating to alleged misconduct of juror Kidwell and the alleged activities of certain operatives of the William J. Burns International Detective Agency. (R. 10).

Respondent Sinclair denied the allegations of the petition heretofore quoted with respect to the purpose for which the Burns Detective Agency was employed. (R. 11).

Respondent Sinclair admitted the employment of the William J. Burns International Detective Agency and that he directed respondent Day to give instructions to the said William J. Burns International Detective Agency as to the duties which were to be performed by the operatives of said Agency (R. 12), and that such instructions were that the operatives so employed should receive strict and peremptory instructions that they should not come in contact with, approach or converse with any of the said jurors and should not in anywise molest, interfere with, impede or influence any of the said jurors in the performance of their duties as such. (R. 15).

Respondent Sinclair further answered in this connection that he believed that in cases involving great public interest the government from time to time had kept jurors under surveillance during the time of such trials and that, entertaining such belief that the government of the United States had exercised such right and privilege, he, as a citizen of the United States, had the same right and privilege. (R. 15).

The respondent Sinclair in his answer specifically denied that the employment of the Burns Detective Agency was for any of the improper or corrupt purposes alleged in said petition. (R. 13, 14).

Respondent Sinclair further alleged in his answer that he had every reason to believe and did believe that for the past four years he had been subject to

surveillance by agents, who he believed were employed by the United States Government. That such agents not only shadowed him at his place of business but about his home, and that they had made numerous and extensive examinations of his books, records and documents and bank accounts and had interrogated his employes and pried into all his activities, of whatever nature, in his private and business life. (R. 16).

At the opening of the hearing on the petition and answer, the motion to dismiss the petition for legal insufficiency was presented and fully argued (R. 76) and the court reserved its decision thereon till after the conclusion of all the evidence, whereupon it was overruled. (R. 851).

The Evidence

The trial was a protracted one, beginning on December 5, 1927, and ending on February 21, 1928 (R. 76), and the evidence taken was very voluminous. The evidence in large part consisted of the testimony of the operatives of the Burns Detective Agency, either by way of oral testimony given by the operatives or by way of the reports which they, from time to time, had made during the operations, and related almost entirely to details of their operations in the work of observing the jurors as directed in their employment.

It is not deemed essential to refer at length to the testimony, oral and documentary, covering the details of the shadowing, more than to make brief references to such testimony. The government introduced in evidence the carbon copies of the reports of the operatives of the William J. Burns International Detective Agency, which were seized by the United States Marshal in executing a search warrant issued on the affidavits of government counsel (R. 193, 360). These reports were contained in a book designated as the "History of New York Operation No. 5023," by which designation the shadowing operation was known. (R. 89). The following are the references to the reports in the record:

Operative	*Designated as*	*Record pp.*
Steer	S-81	90-95
Stewart	S-71	95-100
Sullivan	S-70	100-107
O'Neill	O-3	107-111
Merritt	M-20	112-120
Long (McMullin)	L-36	120-127
Knowles	K-37	128-132
Klein	K-27	133-138
Kirby	K-1	138-144
Homerighausen	H-4	145-147
Dwyer	D-9	148-153
Brennan	B-4	153-156
O'Reilly	O-14	157-169
Robbins	X-12	169-174
Ruddy	Phila. Mgr. C. G. R.	175-181

The government also offered documentary evidence in the nature of statements of the expenses of the manager and the several operatives engaged in the work (R. 181-193). Also, original typewritten report of Operative O'Reilly, dated Oct. 30, 1927, which was seized by the United States Marshal when a raid was made on Oct. 31, 1927, upon the apartment of Manager Ruddy at Wardman Park Hotel. (R. 193). Additional report of Operative O'Reilly, O-14, dated Oct. 30, 1927. (R. 195-196). Also, reports of Operative Merritt, M-20, dated Oct. 30, 1927 (R. 196-197); reports of Operative Steer, S-81, dated Oct. 30, and Oct. ——, respectively (R. 198-199); report of Operative Steer, S-81, dated Oct. —— (R. 200-202); report of Operative Steer, S-81, dated Oct. 29, 1927 (R. 202); report of Operative O'Reilly, O-14, dated Oct. 28, 1927, being the report concerning the investigation of the Land Records respecting the property known as No. 1315 North Carolina Avenue, owned by Juror Kern (R. 205); memorandum of information as to automobile license numbers (R. 207-9); reports of Operative Long (McMullin), L-36, dated Oct. 29, 1927 (R. 209-210); additional memorandum of information as to automobile license numbers (R. 211-217); reports of Operative Merritt, M-20, dated Oct. 29, (R. 218-219); report of Operative O'Reilly, O-14, dated Oct. 29, 1927 (R. 221-222); report of Operative Long (McMullin), L-36, dated Oct. 28, (R. 224-225); report of Operative Merritt, M-20, dated

Oct. 28, 1927 (R. 225-226); report of Operative Steer, S-81, dated Oct. 28 (R. 227-229); report of Operative O'Reilly, 0-14, dated Oct. 28, 1927. (R. 230).

The government then introduced in evidence the original handwritten reports of the operatives of the Burns Agency. (R. 232). These reports were introduced by grouping together the reports of all the operatives for each day from the beginning of the operation, on Oct. 18, 1927. (R. 233). The following are references to the reports as they appear in the record:

	Pages
Reports of all operatives covering Oct. 18	233-237
Reports of all operatives covering Oct. 19	237-254
Reports of all operatives covering Oct. 20	254-271
Reports of all operatives covering Oct. 21	271-290
Reports of all operatives covering Oct. 22	290-307
Reports of all operatives covering Oct. 23	308-322
Reports of all operatives covering Oct. 24	322-337
Reports of all operatives covering Oct. 25	338-346
Reports of all operatives covering Oct. 26	347-353
Reports of all operatives covering Oct. 27	353-358

In addition, the government introduced in evidence, duplicate handwritten reports by Operative Merritt, M-20, covering the operations of Oct. 28, 29, and 30, written from memory after the seizure of the records at the Wardman Park Hotel (R. 359-363); and similar reports written by other opera-

tives—by Operative Steer, S-81 (R. 364); Manager Ruddy (R. 365-366); Operative Robbins, X-12 (R. 366-367); Operative Steer, S-81 (R. 369-370); Operative O'Reilly, 0-14. (R. 370-371).

Following this, all of the operatives of the Burns Detective Agency were called to the stand by the government and testified orally as to the details of the operation. The testimony of the said operatives appears in the record as follows:

	Record page
Robbins,	
Direct examination	398-401
Cross-examination	401
O'Reilly,	
Direct	403-428
Cross	428-435
Redirect	435-437
Stewart,	
Direct	437-448
Cross	448-451
Examination by the court	451-452
Recalled	466
Sullivan,	
Direct	452-456
Cross	461-462
Examination by the Court	462-463
Klein,	
Direct	466-474
Cross	474
Merritt,	
Direct	474-479
Cross	479
Examination by the court	480

	Record Page
O'Neill,	
Direct	526-531
Cross	531-532
Examination by the court	532-533
Steer,	
Direct	533-544
Cross	544-546
Dwyer,	
Direct	547-554
Cross	554-555
Redirect	555-556
Homerighausen,	
Direct	562-570
Kirby,	
Direct	570-575
Cross	575
Knowles,	
Direct	576-581
Cross	581-582
Brennan,	
Direct	582-590
Cross	590-591
Redirect	591-592
McMullin (Long),	
Direct	613-628
Cross	628-658

Counsel for the government and for the respondents cooperated fully in condensing this voluminous record with a view of presenting it on appeal in as consise form as possible. Even after counsel had fully cooperated in an effort to condense the bill of exceptions, the record is voluminous. In present-

ing the questions involved in this appeal, we have considered it unnecessary to take extended excerpts from the evidence, but do present a simple statement of the facts from that record which we deem essential to the determination of the questions involved.

Charles G. Ruddy, Manager of the Philadelphia office of the William J. Burns International Detective Agency, called as witness by the government, testified that he was assigned to the duties of coming to Washington in connection with the surveillance of the jury engaged in United States v. Fall and Sinclair; that he arrived in Washington at 10:20 P. M., October 18th and went to 2118 Leroy Place and met the respondent Day (R. 78); that respondent Day handed him a list of the jurors in the Fall-Sinclair case then on trial. (Government Exhibit 1, R. 79-83). The witness Ruddy further testified that,

> "Mr. Day told me that he wanted me to place each of the jurors under surveillance, and that the jurors were to be held as closely as possible outside of the court; that under no circumstances were any of our men to approach any juror; but he wanted to be particularly informed whether our men who were holding the jurors under surveillance found that the jurors were approached by anyone else; and to be careful to take the numbers of any automobiles other than the jurors' that the jurors

> might get into with anybody; and he emphasized that the men were to be careful and instructed that they were not to approach the jurors at any time or in any way." (R. 83).

The witness further testified that before engaging in the work of observing the jury he received instructions from respondent W. Sherman Burns, as follows:

> "Mr. Burns told me to be very careful to see that the men were very careful and instructed that they were not to embarrass jurors in any way, not to permit them to know that they were being shadowed, and if any man disobeyed the instructions he was to be immediately sent back to his respective office." (R. 84).

The witness Ruddy further testified that he communicated to Sherman Burns the instructions he had received from respondent Day, and Sherman Burns told him that the men should not approach or talk to any of the jurors and that he (Burns) had so instructed the men who had already been detailed from the New York office, and that any men disobeying these instructions were to be returned to their respective offices from whence they reported. The witness Ruddy further testified that he told Sherman Burns that respondent Day requested that the jurors be placed under surveillance, that this was purely a surveillance case. (R. 78, 79).

The witness Ruddy further testified:

> "I gave the operatives, including O'Reilly, the same instructions Mr. Burns had given me, that under no circumstances were they to approach a juror, that they were not to speak to the jurors, and in every way possible not to permit the jurors to know that they were being shadowed. * * * I told the operatives that they should not speak to the members of the jury, and I told them they would be dismissed from the service of the Agency if they did speak to them." (R. 379).

Each of the operatives called as a witness by the government testified that he had received instructions from Manager Ruddy substantially as narrated by the witness Ruddy in his testimony.

The witness **O'Reilly** testified:

> "I came here from the New York office. Merritt came with me. Sherman Burns sent me. He told me I was going to Washington to assist Ruddy in the operation of shadowing certain jurors in a case then on trial in Washington. He told me he had given Ruddy certain instructions which he, in turn, was to give the men, and he asked me, upon my arrival, to convey the same message to each man as I interviewed him, as I was acting as contact man between Ruddy and the operatives. He told me I was to carry out the instructions which he also gave

me, that no man under any circumstances was to approach in any way whatsoever any juror being shadowed, or have conversation with, or physical contact with any juror being shadowed. He told me he had given these instructions to Ruddy, and wanted me to carry the same message to each man; and in event of any violation of these instructions by any man, I was to send him immediately back to his office, or report to Ruddy. I told Ruddy that message of Sherman Burns immediately upon meeting him at the Union Station. I was not present when Ruddy gave instructions to the men on the morning of the 19th. Most of the men told me, when I started to refer to the instructions, that Ruddy had already given them, and they had observed them to the letter." (R. 432-33).

The witness **Stewart** testified:

"Ruddy gave instructions to Long (McMullin) and me at the National Hotel the day we came down here. There were general instructions given and each one was handed a slip of paper designating the juror he was to keep under surveillance, and then instructions were given again to that particular man. • • • We were told to hold certain jurors under surveillance and not to talk to any of the jurors and should it become known that we were following them, to drop off immediately. Ruddy said we would be discharged if we established any contact with a juror." (R. 448-49).

The witness **Sullivan** testified:

"It was impressed on the boys to stay away from the jurors, that is, their previous instructions were repeated. The previous instructions were to place the jurors under surveillance and to keep them at a safe distance and under no circumstances approach a juror or talk to him. All the boys were advised at that time that to disobey those instructions would mean discharge from the agency. Ruddy gave those instructions. He did not tell who instructed him to give them. I received my instructions alone but I knew the other boys had been so instructed, as they told me that they had been instructed to keep a safe distance from the jurors and not to speak to any of them or come in contact with any of them.

"All of them may have told me that. I know they all received the same instructions. As a matter of fact I heard them repeated that night up in the room. I do not know of any reason why they were repeated. Nothing had happened that day that would cause them to call all the agents there to repeat those instructions. It was just Ruddy's way of handling a case." (R. 458-59).

The witness **Klein** testified:

"I got my orders from Scanlon. He told me I was to proceed to Washington that night and there meet Ruddy and that I was going down down there with some of the other boys to place

under surveillance the jurors in the Fall-Sinclair case. He told me he was told by Sherman Burns that we were not to approach or attempt to talk to any of the jurors that we would have under surveillance. On two occasions Ruddy instructed the men, first upon arriving and then on that Saturday morning at O'Reilly's room." (R. 474).

The witness **Merritt** testified:

"On October 19, about 2 p. m. Sherman Burns told me to pack my bag and get ready to go to Washington to work on a case under Ruddy's directions. He told me not to talk to any of the subjects in the matter, and to be very careful. • • • At the station Ruddy gave me a slip of paper with a man's name and address and description on it and said that would be my subject. He told me to be very careful and not let the man see me shadow him, and under no circumstances to connect with him." (R. 474-75).

The witness **O'Neill** testified:

"I received instructions from Scanlon in the New York office about 5 p. m. on the 18th that I was to go to Washington. He instructed me that I would go down there and shadow a juror in the Fall-Sinclair case who would be designated to me by Ruddy. He gave me general instructions as he always does that I was to shadow these jurors and under no circum-

stances was I to approach or come anywhere close to a juror at all, and under no condition talk to a juror, and if a juror attempted to approach me, I was to get out of his way as quickly as possible. • • • He (Ruddy) instructed me the same as Scanlon had, only he was more emphatic. He told me under no conditions to approach a juror or to talk to him, and if the juror attempted to talk to me or to approach me to get out of his way immediately, to run if possible." (R. 526-27).

The witness **Steer** testified:

"I was given instructions if any of the operatives ever talked to a juror they would be sent back to New York and dismissed." (R. 544).

The witness **Dwyer** testified:

"Before leaving New York I received instructions from T. A. Scanlon, manager of the New York office. He told me to go home and pack my bag and return to the office, which I did, and when I returned to the office he told me to proceed to Washington with the operatives I have named; that I was going to work on a surveillance job on the Fall-Sinclair jury; that I should not approach any of the jurors I worked on in any way or shadowed, and if I did he would dismiss me from the agency. • • •

"He (Ruddy) said I was not to connect with any of the jurors in any way and if I did I

would be sent back to New York and dismissed." (R. 547).

The witness **Homerighausen** testified:

"Ruddy instructed me to shadow Mr. Costinett, a juror of the Supreme Court. He told me John J. Costinett occupied Chair No. 3, had a tailoring business at 1212 New York Ave., and lived at 1442 Fairmont St. He told me to place him under surveillance and watch him to see who he connected with, and in case he made any connections, to drop him and take up the connections. He said: 'In no case get too close to Costinett, or anything that would cause any suspicion. If you think at any time that he is suspicious or becomes disturbed, why, drop the case altogether. You may drop it at any time you think it is so justified. If at any time you see anything that is suspicious or looks wrong, get in touch with me immediately, no matter what hour of the night it is. Under no conditions must you cause any alarm to the juror or anybody connected with him. These instructions must be carried out. If you do not carry them out, I will send you back to Baltimore and I will recommend your dismissal.' " (R. 562-63).

The witness **Kirby** testified:

"At the National Hotel I was instructed to go to Court and pick up Juror Holt in Seat No. 6 and follow him to see if anybody connected with

him, and if anybody did to drop the subject and follow the man who connected with him and find out who he was and where he went and all about him, and at no time to get in touch with, or to talk with the juror in any respect, and if I did I would be sent back to Baltimore and dismissed." (R. 571).

The witness **Knowles** testified:

"I met Ruddy at the Union Station at 12:23 the morning of the 21st. He instructed me to check in the Pennsylvania Hotel, and the next morning I was to meet O'Reilly, who would give me a designation on my subject. He also instructed me that while I was shadowing this subject in no way to come in contact with him and not to talk to him, and if I was to disobey those instructions I would be sent back to Philadelphia immediately and discharged from the agency." (R. 576-77).

The witness **Brennan** testified:

"Ruddy told me to be very careful. He cautioned me against talking to the juror and in case the juror should suspect I was following him and should ask me why I was following him, I should walk away and not answer him, and act as if I were crazy." (R. 583).

The witness Ruddy testified in substance that from October 20th all of the operatives reported to him

each day; that the reports of the operatives were in their own handwriting, and that the witness Ruddy made copies on the typewriter of the facts in each report, and that the originals of these typewritten reports were given to respondent Day and the witness Ruddy kept the carbons; that the original typewritten reports were sent to Mr. W. Sherman Burns, in New York; that these typewritten reports were made to respondent Day at his residence, 2118 Leroy Place, at times, but generally they were handed to him at the witness Ruddy's apartment at the Wardman Park Hotel; that there was no stated time for the making of these reports but that after the operatives were organized they were generally made between eleven and one o'clock the next day. (R. 85).

Further revealing the circumstances and object of the employment of the Burns Detective Agency, respondent **W. Sherman Burns,** called as a witness in his own behalf, testified that some time during the afternoon of October 18, 1927, he was asked to get in touch with Mr. Day in Washington, which he accordingly did (R. 775-6); that in substance Day had informed him that he would like to have the jurors in the case of the United States Government against Fall and Sinclair shadowed. The respondent, W. Sherman Burns, further testified that he thereupon called in his New York Manager, Scanlon, and discussed with him the selection of the men to be used and told him that it was a surveillance job and he wanted shadow men and that whatever men he,

Burns, could personally see he would instruct them that they were not to come in contact with any jurors or embarrass them in any way, and that if a juror became aware that he was being shadowed the men should walk away and drop the juror, and that if he (Burns) did not see all of the men, that he wished Scanlon to give the instructions himself. Respondent W. Sherman Burns further testified that he selected the witness Ruddy to be put in charge because of his confidence in the ability of Ruddy; that he got in touch with Ruddy by telephone and explained the matter to him and directed Ruddy to meet respondent Day, at an address in Washington which had been given him, and take instructions from respondent Day and that after he had talked with respondent Day to talk with him, respondent Burns, again, because Burns wished to be sure as to the limitations of the work to be done. That Ruddy, pursuant to directions, had called the respondent W. Sherman Burns after Ruddy's interview with respondent Day and informed him that the work to be done was the shadowing of the jury and of the number of men necessary to be employed.

The respondent W. Sherman Burns further testified:

> "I reiterated my previous instructions and told him to also instruct the men when they reported to him the limitation of this work, that it was merely a shadow job, they were not to approach the jurors, embarrass them in any

way, and if any of the men violated those instructions they were to be returned to their respective offices. Ruddy said that we must report any contact with the jurors and nothing else. That was the purpose of the employment." (R. 777).

Further showing the circumstances and purpose of the employment of the Burns Detective Agency, respondent **Day**, called in his own behalf, testified:

"The first conversation that Mr. Sinclair and I ever had upon the subject of shadowing the jury was about 3 P. M. on October 18. It was after the jury had been sworn and had gone on their business for the rest of the day. I was not in court that day. The conversation was after Mr. Sinclair had come back from court. The subject had not been touched on before between us. I had not ever thought of it before. We were at the Mayflower Hotel in Suite 1031, and Mr. Sinclair stated that he was terribly disappointed that the jury had not been locked up, and that he was very much exercised, that some of his enemies, competitors, and those who had written us so many malicious letters might in some way try to influence this jury, and stated he wanted me to tell one of the secretaries to call up Jeffries in New York and ask him to have one of the Burnses communicate with me at a place which would be convenient for me, and that he wanted from 12 to 14 operatives, with a lieutenant and a captain, sent to Wash-

ington to cover those who were sworn as jurors in this case. He said they were to cover these jurors, not to approach them, not to speak to them, not to in any way come in contact with them. They were simply to observe and report any suspicious acts which in their opinion might be done by the respective jurors, or those coming in contact with them, and to report also, if it was feasible, the people who did come in contact with them in a way which the operatives could do without arousing any suspicion. That is the substance of the instructions." (R. 823-24).

Respondent Day then testified as to the manner in which he got in contact with the Burns Detective Agency. (R. 824, 825).

Respondent Day further testified:

> "I told Ruddy that the jury in the Sinclair-Fall case had not been locked up or kept together, and I wanted from 12 to 14 men to keep these jurors under surveillance to see who they came in contact with, to see if there was anything suspicious, that they were not to talk to them, they were not to interfere, they were not in any way to embarrass them. I repeated the instructions which had been given to me relative to this, and I wanted daily reports of these operatives, through Ruddy to me, as to just what took place." (R. 825-6).

The respondent Day further testified that at that time he handed to the witness Ruddy Government

Exhibit 1, containing the list of jurors. (R. 826).

Respondent Day further testified:

> "I was absolutely not authorized or directed by Mr. Sinclair to employ the Burns Agency for any other purpose than those which I have related, that is to say, shadowing of a jury without any kind of contact." (R. 832).

This comprises the substance of all of the testimony respecting the employment of the Burns Detective Agency and the purpose for which it was employed. There is no evidence that any of the operatives of the Burns Detective Agency ever approached, talked with or came in contact with any of the jurors, or that any of the jurors were at any time aware of the fact that any of the operatives so employed were shadowing them.

Evidence of the Jurors

The record discloses that the following persons were selected and sworn as petit jurors in the case of United States v. Harry F. Sinclair and Albert B. Fall:

(1) Annetta L. Bailey, (2) Bernice K. Heaton, (3) Gardner P. Grenfell, (4) William H. Goucher, (5) Conrad J. Herzog, (6) Robert C. Flora, (7) John P. Kern, (8) Bradner W. Holmes, (9) John J. Costinett, (10) Norman L. Glasscock, (11) Edward J. Kidwell, Jr., (12) Charles Holt.

(R. 2).

In the course of the trial of the contempt charges, eight of the jurors were called as witnesses and testified.

The following comprises all the evidence in the record on the question as to whether any of the jurors were aware of the fact that they were being shadowed during the time they were serving as jurors:

Mrs. Annetta L. Bailey (Juror) testified:

"During the time that I was serving as a juror in the Fall-Sinclair case, I recall a certain incident that occurred at noon recess when Miss Heaton and I were in the anteroom next to the court room proper. I could not say for certain what day it was. I believe it was Thursday or Friday before the mistrial. On that occasion, I recall Edward Kidwell, Jr., coming into that room. There was a talk between Kidwell and either Miss Heaton or myself in my presence on the subject of keeping out of trouble. On October 28th or during the time I was serving as a juror in the Fall-Sinclair case I was at the Convention Hall Bowling Alley when was also present a gentleman by the name of Robinson."

Thereupon the following occurred:

"Q. State whether or not on that occasion when you were in the bowling alley, you became aware that certain men were looking at you, watching you, observing you?"

Thereupon the question was objected to on the ground that the evidence is that the shadow-

ing of Mrs. Bailey ceased on October 21st and there is no connection between this incident and any of the respondents; the objection was overruled and an exception duly noted, and the witness continued:

"Yes, I became so aware." (R. 510-511).

William H. Goucher (Juror) testified:

"At no time during the 23rd day of October was I aware of being followed or shadowed by anyone whatever." (R. 771).

Bernice K. Heaton (Juror) testified:

"I recall an incident that occurred while I was a juror in the Fall-Sinclair case when Mrs. Bailey and I were in the anteroom to the court room at the noon recess when Juror Kidwell came into my presence. On that occasion there was a talk between Kidwell and me or Mrs. Bailey, on the subject of keeping out of trouble." (R. 511).

"I was present during the time that the trial was in progress in the conference room of the jurors, when the subject of being watched or shadowed or followed was mentioned or discussed." (R. 512).

Conrad J. Herzog (Juror) testified:

(Mr. O'Reilly stood up in the back of the court room.)

"I am positive I have seen that gentleman here in court. I told Mr. Burkinshaw in his office that I may have seen him, I thought I had seen him when I was a petit juror in the Fall-Sinclair case, but I wasn't positive about our place of business, the Northeast Motor Company. I can't recall the date. At the time I felt that I saw him I was just at the entrance of our shop. He was outside the shop, talking to a mechanic employed by our concern. I did not thereafter talk to that mechanic. I don't know which one it was. I did not see O'Reilly at any other time; except in court. The day that the Burns operatives were brought into Major Gordon's office was the first time I saw O'Reilly after the mistrial. This was a day or two after the mistrial. At that time I said that his face was familiar and it seemed to me that I had seen him about our place of business." (R. 559).

Thereupon the following occurred:

"Q. Now at the time while the case of United States v. Fall and Sinclair was in progress state whether or not you were aware that you were being followed by any one?"

(Objection to question overruled.)

"A. I had a suspicion. I was not aware." (R. 559-560).

"Q. Now, did that suspicion have to do with any particular incident that took place during the trial?"

(Objection to question overruled.)

"A. I was after leaving court here for luncheon I was driving home. I noticed a car driving slowly back of me. And when I stopped at

the house I made a turn and faced the west and this car stopped on the opposite side of the street facing east. And I entered the house and looked back and saw the man sitting in the car. I waited for a while and he remained in the car, and finally I went to my lunch, and when I came out I didn't notice whether the car was there or whether he had gone." (R. 560).

"I am not sure that it was O'Reilly that I saw down in front of my place. It was when the Burns operatives were paraded before me in the District Attorney's office that I told Burkinshaw about O'Reilly. I cannot identify the man that I saw in the automobile that came up and stopped. I could not identify him if I saw him again. The different agents of the Burns people were brought in the room where the jurors were, and Burkinshaw asked me and the rest of the jurors to watch them closely and see whether or not I could identify any one of them." (R. 561).

Edward J. Kidwell, Jr. (Juror) testified:

"I do not remember seeing either Ruddy, O'Reilly, Klein or Stewart at any time during the trial of Fall and Sinclair. I don't remember seeing any of those men around the courthouse grounds or in the courthouse while I was a juror. I don't remember ever seeing Merritt in the courtroom. I don't remember seeing him ever except that one time at the corner of 5th and G." (R. 487).

"On occasions of going in and out of the court house I never saw any of the Burns Agents that I know of; if they were there I didn't know who they were; I never at any time during the jury trial saw men whom I now know are Burns Agents. (Thereupon McMullen was asked to stand up). I never saw McMullen during that trial that I know of." (R. 488).

"Q. Do you recall an occasion, when you were serving as a petit juror, that there was a talk among the jurors on the subject of being watched or being shadowed? Do you remember such an incident?"

(Objection to question overruled).

"A. Yes.

"Q. When was that?

"A. I cannot say the exact time. It was some time during the trial.

"Q. Can you tell us about how long either before the mistrial was declared or how long after the trial started?

"A. I think it was about two weeks after the trial started or something like that.

"Q. And where did it occur?

"A. In the jury room.

"Q. What do you mean by the jury room—the consultation room?"

(Objection to question overruled).

"By jury room I mean the first room on the east side of the corridor of this floor, where the jurors assembled."

"Q. Now, to the best of your recollection, what jurors were present on that occasion?"

(Objection to question overruled).

"I don't know exactly who was present. There were about 6 or 8, or probably more. I think it was one morning that we were sent out into the jury room during an argument on a question of law. Jurors Herzog, Holmes and Kern were there." (R. 498-99).

It will thus be seen that only five of the jurors were interrogated with respect to the question as to whether they or any of them were aware of the fact that they were being shadowed during the time they were serving as jurors, and none of them testified that they were so aware. The following jurors, although called as witnesses and testifying in the case, were not asked any questions as to whether they were aware of the fact that they were being shadowed at the time they were serving as jurors: Norman L. Glasscock (R. 658-660); Gardner P. Grenfell (R. 557-559); John P. Kern (R. 556-557).

The following jurors were not called as witnesses: John J. Costinett, Robert C. Flora, Bradner W. Holmes and Charles Holt; and there is no evidence in the record from any source that any one of them was aware of the fact that they were being shadowed while serving as jurors.

Motions to Dismiss

When the government rested its case (R. 696), the respondents then severally moved that the rule upon the respondents be discharged and the petition

dismissed, on the ground already stated in the motion to dismiss when the sufficiency of the petition was questioned, and on the further ground that none of the allegations of the purposes and designs alleged in the petition were at all supported by any evidence introduced by the government; on the ground that there was not a scintilla of evidence showing that anybody proceeding from any of the respondents ever came in contact with a juror or ever approached a juror, or ever conversed with a juror, or ever sought to approach or converse with a juror, or that a single juror was ever conscious of being shadowed; on the ground that no act of respondents obstructed or directly tended to obstruct the administration of justice; on the ground that the government had undertaken to charge the respondents with a conspiracy to commit a criminal offense and therefore there was a variance; on the ground that shadowing *per se* is not a violation of the law, and therefore not contempt of court; on the ground that the submission of the McMullin affidavit was not contempt of court, because there was no trial then pending and nothing was asked to be done with it; on the ground that this prosecution is based on Section 135 of the Penal Code.

This motion was overruled and an exception duly noted by each respondent. (R. 698).

It is obvious that the petition of the government rested upon the theory that the respondents had violated Section 135 of the United States Penal Code,

and that this in and of itself constituted a contempt of court, without regard to the question as to whether the acts done by the respondents or any one acting for them obstructed the administration of justice, or had a direct tendency to obstruct justice. This is disclosed by the argument made by the District Attorney on the motion of the respondents to dismiss the petition and discharge the rule. He said:

> "I have in mind Section 135 of the Federal Penal Code. And an act which would violate Section 135 of the Federal Penal Code, while indictable under that section, if the Court sees fit, if it is committed in its presence or so near thereto as to obstruct the due administration of justice, that would be contempt of the court of which the Court would have the power and the jurisdiction to cite the persons so offending and hold them for contempt and punish them for contempt in a summary way." (R. 77).

After quoting Section 135 of the United States Penal Code, the District Attorney concluded:

> "The petition sought to bring to the Court's attention the acts of these respondents as a contempt of Court, for doing acts that the Government considered was a violation of the language of that section, and hence a contempt of Court." (R. 78).

Again at the conclusion of the whole case, the respondents severally moved the court to discharge the

rule and dismiss the petition, which motion the court overruled, to which ruling the respondents severally excepted. (R. 842).

The court thereupon adjudged the respondents guilty of contempt (R. 842, 855), concluding his judgment in the following language:

> "I cannot escape the conviction, therefore, that respondent Sinclair, respondent Day, respondent Sherman Burns, and respondent W. J. Burns, have been, perhaps in different degrees, all involved, more or less directly involved, in the establishment of this surveillance, a surveillance which I have already announced in my opinion constituted an obstruction to the administration of justice by this Court. If it had not been for that surveillance from aught that appears in this testimony, there never would have been a mistrial in this case, a surveillance that at least in part, together with the publication of the affidavit regarding it, but at least in part, necessitated a mistrial." (R. 854-55).

Thereupon the trial court imposed upon the respondent Sinclair a sentence to imprisonment for six months in the Washington Asylum and Jail, (R. 860); from the judgment of the Court finding the respondent guilty of contempt and imposing the sentence, the respondent Sinclair noted an appeal to the Court of Appeals, and the case is now here for review by this court pursuant to its order directing that the whole record be sent up.

POINTS TO BE DISCUSSED ON THIS BRIEF

Point I.

The Trial Court Erred in Denying the Motion of the Respondents to Dismiss the Petition of the United States and Discharge the Rule to Show Cause.

The reasons to be urged in support of the proposition that the court erred in denying the motion of the respondents to dismiss the petition are:

1. The said petition does not allege facts sufficient in law to confer jurisdiction upon this court to adjudge the respondent guilty of contempt.

2. The said petition fails to allege facts sufficient as matter of law to charge this respondent with contempt of court.

3. The facts alleged in said petition are insufficient as matter of law to charge misbehavior by this respondent in the presence of the court or so near thereto as to obstruct the due administration of justice.

4. The said petition does not allege facts showing or even tending to show that the respondent has been guilty of acts or conduct in any wise impeding or tending to impede the due administration of justice.

5. This court is without jurisdiction to try this respondent or to adjudge him guilty of contempt of this court upon the allegation of said petition.

6. The court is without jurisdiction to entertain said petition or to make any adjudication thereon, because said petition is lacking in necessary and essential allegations showing that this respondent has been guilty of misbehavior in the presence of the court or so near thereto as to obstruct or impede the due administration of justice. (R. 9).

Under this point assignment of error No. 1 (R. 46-47) will be discussed.

Point II.

The Trial Court Erred in Denying the Motion of the Respondents to Dismiss the Petition and Discharge the Rule at the Close of the Case in Chief of the United States.

The reasons to be urged in support of the proposition that the court erred in denying the motion of the respondents are the reasons set forth under Point I and the following additional reasons:

(a) The evidence offered by the United States was insufficient as matter of law to establish the charge of contempt of court.

(b) None of the allegations of purpose or design alleged in the petition were at all supported by any evidence introduced by the United States.

(c) There was not a scintilla of evidence showing that any person proceeding from or connected with

any of the respondents ever came in contact with a juror, ever approached a juror, ever conversed with a juror, or ever sought to approach or converse with a juror; or that a single juror was ever conscious of being shadowed.

(d) No act of respondents obstructed or directly or indirectly tended to obstruct the administration of justice.

(e) By the petition filed in the cause the United States had undertaken to charge the respondents with a conspiracy to commit a criminal contempt and there was a variance between the allegation of said petition and the evidence offered by the United States in support thereof.

(f) Jury shadowing *per se* is not a violation of law, and therefore not a contempt of court.

(g) The submission of the McMullin affidavit was not contempt of court and could not be contempt of court as there was no trial then pending, and no action was requested with respect to said affidavit.

(h) In and by said petition the United States undertook the prosecution of the respondents for a criminal offense, based upon Section 135 of the United States Penal Code.

Under this point assignment of error No. 2 (R. 47-48) will be discussed.

Point III.

The Trial Court Erred in Denying the Motion of Respondents to Dismiss the Petition and Discharge the Rule at the Close of the Whole Evidence.

The reasons to be urged in support of the proposition that the court erred in denying the motion of the respondents are the reasons set forth under Point II.

Under this point assignment of error No. 3 (R. 48) will be discussed.

Point IV.

The Trial Court Erred in Adjudging the Respondents Guilty of Contempt and in Holding That the Acts of the Respondents Obstructed or Tended to Obstruct the Due Administration of Justice.

Under this point the following assignments of error will be discussed:

4. The court erred in making conclusions of law in finding the respondent guilty of contempt.

5. The court erred in making findings of fact in determining the respondent guilty of contempt of court.

6. The court erred in adjudging the respondent guilty of contempt.

7. The court erred in not adjudging that the acts done by the respondent Harry F. Sinclair, or those

acts authorized by him to be done, neither obstructed nor tended to obstruct the due administration of justice so as to constitute contempt of court. (R. 48).

Point V.

The Trial Court Erred in Excluding Evidence Offered by the Respondents to Show That for a Number of Years It Had Been the Usage and Custom of the United States Government, in Cases Being Prosecuted by the United States in the Various Circuits Throughout the United States to Have the Agents of the Bureau of Investigation of the Department of Justice Actually to Shadow Jurors While They Were Serving as Jurors in Such Cases.

Under this point assignments of error 13 to 57, inclusive, will be discussed. (R. 49-60).

Point VI.

The Trial Court Erred in Excluding Evidence Offered by the Respondents to Show That the Respondent Day Knew That It Was the Custom and Practice of the United States to Have Representatives of the Department of Justice Shadow Jurors Actually Serving in the Trial of Cases Prosecuted by the United States in the Federal Courts in New York.

Under this point assignments of error 59 to 62, inclusive, will be discussed. (R. 60-61).

Point VII.

The Trial Court Erred in Excluding Evidence Offered by the Respondents to Show What the Witness O'Reilly Actually Said on the Occasion of His Visit to the Home and the Barber Shop of the Father of the Juror Kidwell.

Under this point assignments of error 63 to 68, inclusive, will be discussed. (R. 61, 62).

Point VIII.

The Trial Court Erred in Receiving Over the Objections of the Respondents Evidence by the Witness Kidwell, Jr., of Conversations with an Unidentified Man in the Museum Grounds and at the Door of the Court House.

Under this point assignments of error 69 and 70 will be discussed. (R. 62, 63).

Point IX.

The Trial Court Erred in Receiving Over the Objection of the Respondents Evidence of the Witnesses Kidwell, Jr., and Heaton as to Conversations Among the Jurors.

Under this point assignments of error 72, 73, 74, 75 (R. 63), and assignment of error 82 (R. 64) will be discussed.

Point X.

The Trial Court Erred in Receiving Over the Objection of the Respondents Evidence of the Witnesses Kidwell, Jr., and His Mother, Mary Pearl Kidwell, as to Conversations Between the Juror Kidwell and His Mother and Father During the Time He Was Serving upon the Jury.

Under this point assignments of error 76 to 81, inclusive, will be discussed. (R. 63, 64).

ARGUMENT

Points I, II, III and IV.

(1) The Trial Court Erred in Denying the Motion of the Respondents to Dismiss the Petition of the United States and Discharge the Rule to Show Cause; (2) The Trial Court Erred in Denying the Motion of the Respondents to Dismiss the Petition and Discharge the Rule at the Close of the Case in Chief of the United States; (3) The Trial Court Erred in Denying the Motion of Respondents to Dismiss the Petition and Discharge the Rule at the Close of the Whole Evidence; (4) The Trial Court Erred in Adjudging the Respondents Guilty of Contempt and in Holding That the Acts of the Respondents Obstructed or Tended to Obstruct the Due Administration of Justice.

These four points will be argued together.

The fundamental fact to be borne in mind in the consideration of these points is that there is no evidence that any of the operatives of the Burns Detective Agency ever approached, talked with, or came in contact with any of the jurors, or that any of the jurors were at any time aware of the fact that any of the operatives so employed were shadowing them. The record will be searched in vain for any evidence that shows that anyone acting for any of the respondents ever came in contact with a juror, ever approached a juror, ever conversed with a juror, ever sought to approach or converse with a juror, or that any juror was ever conscious of the fact that anyone representing any of the respondents was shadowing or holding under surveillance any of the jurors. So that we start with this clear proposition: Is the shadowing of a jury under these circumstances a contempt of court?

The legal question, freed of every other consideration and stated in its simplest form, is: Did the court have the power to punish for contempt in the absence of evidence showing an obstruction of justice, or acts done having a direct tendency to obstruct justice? It is not a question of the rights of the respondent Sinclair to employ the Burns Detective Agency to shadow the jury. Neither is it a question of the intent of respondents with respect to any act which the record shows that they or any of them did. It is not a question of a violation of a statute

by any or all of the respondents. It does not involve any question of motive or design which any or all of the respondents may have had. It does not involve the wisdom or propriety of any of the acts of respondents. The sole question and the one indispensable to enable the court to act in adjudging respondents guilty of contempt, is: Did any act or acts for which these respondents are responsible obstruct or tend directly to obstruct the administration of justice?

The language of the statute under which this proceeding was instituted is (Sec. 268, Judicial Code), (U. S. C. A., tit. 28, Sec. 385); "The said courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, That such power to punish for contempts shall not be extended to any cases except the misbehaviour of any person in their presence or so near thereto as to obstruct the administration of justice"; and it has been held by this court (*Toledo Newspaper Co.* v. *United States*, 247 U. S. 402) that this provision conferred no power not already granted and imposed no limitation not already existing. Congress did no more in the statute than to guarantee to the courts that which they had theretofore possessed, that is, the right of self-preservation, and this guarantee was secured by a deposit of power in the courts in their very creation and confirmed by the statute. That power cannot be used or brought into play unless and until an act is

done which obstructs or directly tends to obstruct the administration of justice, and the power to hold and punish for contempt cannot be exercised legally until such an act of obstruction or such an act which tends directly to obstruct has been proved to have been done by the person accused. There can be no claim, based upon the facts shown in the record herein, that there was any obstruction of justice; but it has been said that the shadowing of the jury, as shown by the facts in this record, had an indirect tendency to obstruct the administration of justice. This, we say, falls far short of an act necessary to enable the court to exercise the power to punish for contempt. Moreover, we confidently assert that the facts as to the shadowing clearly demonstrate that there was neither a direct nor an indirect tendency to obstruct the administration of justice. The very nature of the act of shadowing itself has no tendency of any character or kind which could or would reach the jury or the person shadowed. The very limitations of the shadowing, as shown by the evidence, take from it any tendency to reach or come in contact with the jury. A tendency is that which, if not arrested, leads to some place. It is foreordained in the very nature of shadowing and surveillance, that the knowledge of it shall never reach the shadowed person. The record in this case shows that the shadowing, thus limited, or the knowledge of it, never reached or touched the consciousness of any of the jurors; that it was a case of simple shadowing,

which in and of itself refutes any claim of tendency toward contact with the jury.

The trial court fell into the error of resting the question of whether the acts done by the respondents and those acting for them, as shown by the evidence, constituted contempt of court, upon the determination of the right of the respondents to shadow the jurors, rather than upon the question of the power of the court to punish for contempt, in the absence of evidence showing an obstruction of justice or acts done having a direct tendency to obstruct justice. The trial court, in finding the respondents guilty of contempt, held that the mere shadowing of the jurors, without more, warranted such holding. In the course of the decision the trial court said:

> "I can only see in the assertion and in the exercise of a right such as this one that makes almost inevitably and in and of itself when exercised an obstruction to the administration of justice." (R. 846).

Again, the court said:

> "I can only see in the right claimed and to the extent as claimed and exercised in this case an obstruction of justice, and I am not able to follow the contention made here that before you can judicially denounce it as offending against the law, that the obstruction of justice must have been accomplished." (R. 847).

The court, in conclusion, said:

> "• • • I cannot escape the conviction, therefore, that respondent Sinclair, respondent Day, respondent Sherman Burns and respondent W. J. Burns, have been, perhaps in different degrees, all involved, more or less directly involved, in the establishment of this surveillance, a surveillance which I have already announced in my opinion constituted an obstruction to the administration of justice by this Court." (R. 855).

We maintain: First, that this is simply a question of power of a court to hold and punish for contempt; second, that the right to exercise legally that power does not arise unless and until it is established by the evidence that the person accused has done some act or acts which obstruct or directly tend to obstruct the administration of justice; third, that, before the act or acts complained of can be said to have obstructed or directly tended to obstruct the administration of justice, the evidence must show that the act or acts complained of operated upon or influenced the minds of a juror or had a direct tendency to do so. The principles of law applicable to these propositions fall within a very narrow compass.

Contempt of court is a conclusion of law from acts. The petition here does not allege, and the evidence does not support a finding, that respondent Sinclair committed any act which might lawfully

invoke the exercise by the trial court of its power to punish for contempt. Let us first inquire into what such power consists of.

Regardless of what otherwise might be the inherent power of a court to punish for contempt, it is now definitely settled that the power of the lower federal courts is defined and limited by Section 268 of the Judicial Code (R. S. Sec. 725; U. S. C. A., tit. 28, Sec. 385) which reads as follows:

> "Sec. 268. (ADMINISTRATION OF OATHS; CONTEMPTS.) The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (36 Stat. L. 1163)."

This section was originally enacted as Section 1 of "An Act Declaratory of the Law Concerning Contempts of Court," approved March 2, 1831. The Act of 1831 also contained as Section 2 the following (4 Stat. L. 488):

"Sec. 2. *And be it further enacted,* That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense."

The above Section 2 of the Act of 1831 is, now slightly changed, Section 135 of the Federal Penal Code which reads as follows:

"Sec. 135. (INTIMIDATION OR CORRUPTION OF WITNESS OR GRAND OR PETIT JUROR OR OFFICER.) Whoever corruptly or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commis-

sioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. (35 Stat. L. 1113.)"

In *Ex Parte Robinson*, 19 Wall. 505, in speaking of the Act of 1831 this court said (p. 509):

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2, 1831. 4 Stat. at L., 487. The Act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution may, perhaps, be a matter of doubt, but that it applies to the circuit and district courts there can be no question. These courts were created by Act of Congress. Their powers and duties depend upon the Act calling them into existence or subsequent Acts extending or limiting their jurisdiction. *The Act of 1831 is, therefore, to*

them, the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: (1) *Where there has been misbehavior of a person in the presence of the courts or so near thereto as to obstruct the administration of justice;* (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes." (Italics ours).

And in the very recent case of *Michaelson* v. *United States*, 266 U. S. 42, this court in holding that a provision of the Clayton Act giving a right to trial by jury in cases of proceedings for contempt in violation of injunctions by acts which are also criminal is not unconstitutional, said (p. 65):

"But it is contended that the statute materially interferes with the inherent power of the courts, and is therefore invalid. That the power to punish for contempts is inherent in all courts has been many times decided and may be re-

garded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress (Ex parte Robinson, 19 Wall. 505, 510, 511, 22 L. Ed. 205, 208; Bessette v. W. B. Conkey Co., 194 U. S. 324, 326, 48 L. Ed. 997, 1001, 24 Sup. Ct. Rep. 665); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, and is, in express terms, carefully limited to the cases of contempt specifically defined."

No one will contend that the Supreme Court of the District of Columbia has any power to punish for contempt of court other or greater than that enjoyed by the lower federal courts. *Ex parte Bradley*, 7 Wall. 364.

The question involved in this appeal is therefore whether the petition alleges and the evidence supports a finding that respondent Sinclair was guilty of misbehavior in the presence of the court below "or so near thereto as to obstruct the administration of justice." It will be helpful in reaching a right conclusion to inquire at the outset into the *rationale* of the power.

In *Marshall* v. *Gordon*, 243 U. S. 521, this court held that the power of Congress to deal directly by way of contempt without criminal prosecution was implied from the constitutional grant of legislative power to Congress in so far, and so far only, as such authority is necessary to preserve and to carry out the legislative power granted. Chief Justice WHITE, speaking for the court, said (p. 541):

> "The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end, and not the end itself. Hence it rests solely upon the *right of self-preservation* to enable the public powers given to be exerted." (Italics ours).

Again, the court said (p. 546):

> "The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the government, express or implied, as contemplated by the Constitution. And as this is

considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers, manifested in state constitutions even before the adoption of the Constitution of the United States, by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion, and yet, at the same time, not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish—a beneficient result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted."

In the case of *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, this court extended the doctrine of the *Marshall Case*, *supra*, to the power of the courts to punish for criminal contempt. Chief Justice WHITE, speaking for the court, said (p. 416):

"1. Section 268 of the Judicial Code and its forerunner, the Act of 1831.

"It is essential to recall the situation existing at the time of the adoption of the Act of 1831 in order to elucidate its provisions. In Marshall v. Gordon, 243 U. S. 521, 61 L. Ed. 881, L. R.

A. 1917F, 279, 37 Sup. Ct. Rep. 448, the power of Congress to summarily punish for contempt came under consideration and it was there pointed out that the enlarged legislative power on that subject which prevailed in England prior to the separation, whether based upon the commingling of legislative and judicial authority or upon any other cause, was necessarily in this country greatly restricted and changed by the effect of the adoption of the Constitution and the operation of the division of powers and the guaranties and limitations which that instrument embodied. Considering this condition in the light of the colonial legislation on the subject and the previous state Constitutions, it was pointed out that it had come to be established, either by express constitutional or legislative provisions or by inevitable implications resting upon the very existence of government, that while the limitations as to mode of accusation of crime and methods of trial had fundamentally changed the situation which had previously existed, such change had not deprived the legislative power of the right, irrespective of its authority by legislation to provide for the trial and punishment of criminal acts, in addition to summarily deal by way of contempt proceedings with wrongful acts obstructing the legislative power in the performance of its duty. This authority, it was held, was but an incident of the powers conferred, and indeed that its exertion in ultimate analysis was a means of securing the effective operation of the constitutional limitations as to mode of accusa-

tion and methods of trial. It was pointed out that the authority thus recognized automatimatically inhered in the government created by the Constitution, was sanctioned by a long line of judicial decisions and by state and federal practice, although the legislative power, doubtless as a mere consequence of a reminiscence of what had gone before, and momentarily forgetful of the limitations resulting from the Constitution, had sometimes exerted authority in excess of that which it was decided was really possessed.

"While the Marshall case concerned the exercise of legislative power to deal with contempt, the fundamental principles which its solution involved are here applicable to the extent that they may not be inapposite because of the distinction between legislative and judicial power. Indeed, the identity of the constitutional principles applicable to the two cases, subject to the differences referred to, was pointed out on pages 542 and 543, where it was said: 'So, also, when the difference between the judicial and legislative powers is considered and the divergent elements which, in the nature of things, enter into the determination of what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt; that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831, 4 Stat. at L. 487, chap. 99, Comp. Stat. 1916, Sec. 1245.'

"The pertinent provision of Sec. 268 of the Judicial Code is as follows: 'The said courts (United States courts) shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice * * *.'

"Clarified by the matters expounded and the ruling made in the Marshall case there can be no doubt that the provision conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed. And this is not at all modified by conceding that the provision was intended to prevent the danger by reminiscence of what had gone before of attempts to exercise a power not possessed, which, as pointed out in the Marshall case, had been sometimes done in the exercise of legislative power. The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power

given by summarily treating such acts as a contempt and punishing accordingly. *The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty*—a conclusion which necessarily sustains the view of the statute taken by the courts below and brings us to the second question, which is:" * * * (Italics ours).

Again, in the *Toledo Newspaper Case, supra*, the court said (p. 414):

"Condensing, for the sake of brevity, and looking at the substance of things, these conclusions of the court embraced four grounds: (a) Because, leaving aside the attempted ridicule, not to say vituperation, concerning the court, which was expressly or impliedly contained in the publications, their manifest purpose was to create the impression on the mind of the court that it could not decide in the matter before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind as would leave no room for doubt that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. (c) Because the publications also obviously were intended to produce the impression that any order which might be rendered by the court in the dis-

charge of its duty, if not in accord with the conceptions which the publications were sustaining, would be disregarded and cause a shrinking from performing duty to avoid the turmoil and violence which the publications, it may be only by covert insinuation, but none the less assuredly, invited. And (d) because the publications were of a character, not merely because of their intemperance, but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publications."

With reference to the contention of counsel, the court said (247 U. S. 420):

"3. The contention that there was no evidence whatever to justify attributing to the publications the consequence of obstruction and therefore no legal basis for the conclusion of guilt and resulting right to impose penalties.

"It is to be observed that our power in disposing of this objection is not to test divergent contentions as to the weight of the evidence, but simply to consider the legal question whether the evidentiary facts found had any reasonable tendency to sustain the general conclusions of fact based upon them by the courts below. Considering the subject in this aspect again we are constrained to say that the contention on the face of the record is too plainly devoid of merit

to require any detailed review. Indeed, we are of opinion that the court below was right in saying, concerning the ultimate conclusions of fact upon which its action was based, that it was 'difficult to see how any other findings could have been made.' True, it is urged that although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated, in a daily paper having a large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is controlled by the reasonable tendencies of the acts done, and not by extreme and substantially impossible assumptions on the subject. Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications, and therefore there was no proof tending to show the wrong complained of. But here again, not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of

> how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

Government counsel, in the trial court and in the Court of Appeals of the District of Columbia, relied upon the *Toledo Newspaper Case, supra*, in support of the contention that there may be a contempt of court even though the persons engaged in the shadowing of the jury did not approach, come in contact with, or in any manner impede or interfere with the jurors in the performance of their duties. Government counsel argue that this court sustained the conviction in the *Toledo Newspaper Case, supra*, although the defamatory publications "never reached the eyes or attention of Judge Killits, nor were the newspapers carrying such matters ever circulated in the courtroom." In taking this position, government counsel wholly misconceive the facts in the *Toledo Newspaper Case*. The record in that case in this court discloses that the contempt proceedings were initiated by Judge Killits making an order directing the United States Attorney to file an information charging contempt. In the order made by the court, it is recited "*Whereas there have come to the attention of the judge of this court as a daily reader of the newspaper published*," etc. (*Toledo Newspaper Case*, record p. 2). The record

in that case further discloses that the order made by the court directing the United States Attorney to prepare and file the information was offered and received in evidence. (*Toledo Newspaper Case*, record p. 231). In the opinion of Judge Killits, in the United States District Court (220 Fed. 458, 509), it is said: "*Besides, the order for an information, offered and received in evidence without objection, recites that each of the publications was seen by the judge as a daily reader of the News Bee.*" (Italics ours.) It was in the light of this state of the record that this court rejected the contention of counsel that there was no evidence to show that the objectionable publications were brought to the attention of Judge Killits.

We think a fair statement of the *Toledo Newspaper Company* decision is found in *Coll* v. *United States*, 8 F. (2d) 20, 23, wherein the Circuit Court of Appeals for the First Circuit said:

> "The only decision of the Supreme Court, which even arguably lends any support to the Government's contention, is Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186. In that case a bare majority of the Supreme Court held that the District Court might punish as contempt newspaper publications concerning injunction proceedings, tending under the circumstances to create the impression that a particular decision would evoke public suspicion of the judge's integrity and fairness, and bring him into public

odium, and would be met by public resistance, and also tending, under the circumstances, to provoke such resistance in fact. But that case on the facts is plainly distinguishable from the one at bar. See the elaborate review of the facts by the District Court in 220 F. 458, and in the Court of Appeals in 237 F. 986."

That the language used by this court in the *Toledo Newspaper Company Case, supra*, is strongly colored by the facts in that particular case is obvious from the later case of *Ex Parte Hudgings*, 249 U. S. 378, where the court again speaking through Chief Justice WHITE, emphasized the importance of "*the further element of obstruction to the court in the performance of its duty.*" (Italics ours). In that case a witness had been committed for contempt on the ground that in the opinion of the trial judge he was testifying falsely as to his ability to identify a certain handwriting. This court held that the case was of such a character as to be an exception to the rule of procedure that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of the court, and that they should finally dispose of the questions in the proceedings for habeas corpus, and ordered that the petitioner be discharged from custody under his commitment for contempt. The court said (p. 382):

"That the contumacious refusal of a witness to testify may so directly obstruct a court in the

performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was wilfully refusing to testify truthfully; that is, was committing perjury.

"Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law, and one committing it may be tried and punished, does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury, see Berkson v. People, 154 Ill. 81, 39 N. E. 1079; Re Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; Stockham v. French, 1 Bing. 365, 130 Eng. Reprint 147; and see Re Schulman, 101 C. C. A. 361, 177 Fed. 191; Re Steiner, 195 Fed. 299; Re Ulmer, 208 Fed. 461; United States v. Appel, 211 Fed. 495. This being true, we must ascertain what is the essential ingredient in addition to the elements, constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both.

"Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. Toledo Newspaper Co. v. United States, 247 U. S. 402, 62 L. Ed. 1186, 38 Sup. Ct. Rep. 560; Marshall v. Gordon, 243 U. S. 521, 61 L. Ed. 881, L. R. A. 1917F 279, 37 Sup. Ct. Rep. 448, Ann. Cas. 1918B, 371.

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted,—a principle which, applied to the subject in hand, exacts that *in order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty.* As illustrative of this, see United States v. Appel, *supra.* It is true that there are decided cases which treat

perjury without any other element, as adequate to sustain a punishment for contempt. *But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing.*" (Italics ours).

The Court of Appeals of the District of Columbia has recognized that obstructiveness is the essential element of contempt of court. In *McCaully* v. *United States*, 25 App. D. C. 404, 413, it said: "the question is not one of geography or topography, or propinquity or remoteness, *but one of direct influence upon the administration of justice.*" (Italics ours).

To the same effect are:

Pierce v. *United States*, 37 App. D. C. 582,
Ex Parte Savin, 131 U. S. 267,
Ex Parte Cuddy, 131 U. S. 280,
Kirk v. *United States* (C. C. A. 9), 192 Fed. 273,
In re Independent Publishing Co. (C. C. A. 9), 240 Fed. 849,
United States v. *Huff*, 206 Fed. 700,
Telegram Newspaper Co. v. *Commonwealth*, 172 Mass. 294,
Myers v. *State*, 46 Ohio St. 473.

A necessary corollary to the principle enunciated by this Court (247 U. S. 419) that the test "*is the character of the act done and its direct tendency to*

prevent and obstruct the discharge of judicial duty" is that if the act done does not have such a tendency, it makes no difference what the purpose, design or intention of the act was.

In *Wartman* v. *Wartman*, Taney 362, 29 Fed. Cas. No. 17,210, Chief Justice TANEY said, "*As regards the question whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done. It is a conclusion of law from the act.*" (Italics ours.) On this point see also *Kelly* v. *United States* (C. C. A. 9), 250 Fed. 947; *Levinstein* v. *E. I. du Pont de Nemours & Co., Inc.*, 258 Fed. 262.

Therefore the colorful allegations of the petition that the object of respondent Sinclair in employing detectives to watch the jurors was "to bribe, intimidate and influence said jurors and each or any of them and to do anything calculated to interfere with and impede said jurors and each of them in the unbiased discharge of their duties in the trial of said cause," etc. (R. 3, 4) are meaningless. The sole question is whether respondent Sinclair did any act to influence or interfere with any juror or tending directly to influence and interfere with any juror. The record is barren of any evidence that he did any such act or that he had the motive and design charged in the petition.

Another necessary deduction from the principle *that obstructiveness is the essence of contempt* is found in the rule that misbehavior of such a char-

acter as to constitute contempt of court can only occur during the pendency of a proceeding. There must be something before a court to which the alleged misbehavior relates. If it occurs prior or subsequent to the proceeding, it can have no obstructive quality. In *Craig* v. *Hecht*, 263 U. S. 255, Mr. Chief Justice TAFT, delivering a concurring opinion, said: (P. 278)

> "If the publication criticizes the judge or court after the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended so that the carrying of the court's judgment cannot be thereby obstructed, the publication is not contempt and cannot be summarily punished by the court, however false, malicious or unjust it may be."

See also *Patterson* v. *Colorado*, 205 U. S. 454, and the recent case of *Coll* v. *United States* (C. C. A. 1), 8 F. (2d) 20, wherein the Circuit Court of Appeals for the First Circuit, distinguishing between the first section of the Act of 1831 (now Section 268 of the Judicial Code) and the second section of the Act (now, slightly modified, Section 135 of the Penal Code), held that an act alleged to constitute an endeavor to influence the testimony of a prospective witness, occurring when the court was not in session and before the prospective witness had been summoned, did not amount to contempt of court within the meaning of Section 268.

Therefore, even if the record disclosed (as it does not) that respondent Sinclair had anything to do with procuring the making of the affidavit alleged in the petition to be false (R. 5) and the submission of said affidavit to the Honorable Frederick L. Siddons, Associate Justice of the Supreme Court of the District of Columbia, there could be no contempt of court as there was nothing pending before said Justice to which such affidavit related. We have pointed out elsewhere (Brief, p. 131) that the evidence as to the submission of the said affidavit was not received as affecting the respondent Sinclair (R. 621-22).

Having established that the only proper test of contempt of court is *whether the act complained of is of such a character as to obstruct or tend directly to obstruct the administration of justice*, let us consider various classes of cases in which the test has been applied.

The first class consists of cases where a juror has been approached in an attempt to influence him in the impartial discharge of his duties. Such a case was *McCaully* v. *United States*, *supra*, decided by the Court of Appeals of the District of Columbia. Clearly such conduct is contempt.

A second class of cases is found in those where there was a conspiracy to do an act which would constitute contempt of court but where the contempt is not actually committed. Such a case is *Doniphan* v. *Lehman*, 179 Fed. 173. The facts in that case

were that the conspiracy alleged was entered into between Doniphan and Lehman in the States of Kentucky and New York and the overt acts in furtherance of the conspiracy were committed in those states. The acts committed in Kentucky consisted in the sale and delivery of property and in the payment of money and it was not claimed that those acts, however reprehensible, constituted a contempt of court. The act claimed to constitute a contempt was the taking of a deposition in New York in furtherance of the alleged conspiracy by Doniphan before an officer selected by agreement of the parties, and sending the same by mail to the Clerk of the Court at Indianapolis, Indiana, who received and filed the same to be used on the trial of the suit. After the deposition was filed, it was published but at whose instance it was not shown. The Circuit Court of the District of Indiana, after referring to Revised Statutes, Section 725 (Sec. 268 of the Judicial Code), said at page 174:

> "This statute embraces three classes of cases in which the court is given jurisdiction to punish contempts: (1) Misbehavior of any person in the presence of the court or so near thereto as to obstruct the administration of justice; (2) misbehavior of the officers of the court in their official transactions; (3) disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the court. The facts

set out clearly do not present a case of contempt under the second or third clauses of the above section. If a contempt is disclosed, it is under the first clause, making misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice a contempt. A conspiracy to misbehave in or near the presence of the court for the purpose of obstructing the administration of justice does not of itself constitute a punishable contempt. It is the act of misbehavior in or near the presence of the court, and not the conspiracy, which constitutes the contempt. If the complainant, Doniphan, and the defendant, Lehman, formed the alleged conspiracy, they committed no contempt in so doing. And if they have committed overt acts in furtherance of the conspiracy, they have not made themselves amenable to punishment for contempt unless their acts constitute misbehavior in or so near the presence of the court as to obstruct the administration of justice. The taking of a deposition in New York for the purpose of furthering the conspiracy cannot be held to be misbehavior in or so near the presence of the court as to obstruct the administration of justice. The taking of such a deposition is not misbehavior in or near the presence of the court, nor does its mere taking tend to obstruct the administration of justice. Something more must be done than merely to take a deposition in New York in order to obstruct the administration of justice here. The misbehavior must be a hindrance or obstruction of justice; and, so long

as the deposition is not used or offered to be used in court, it cannot be regarded as an obstruction to the administration of justice. It may never be used or offered for use in court. The filing of it in the clerk's office and its publication after such filing cannot of themselves be held to be misbehavior in or so near the presence of the court as to obstruct the administration of justice. It cannot be regarded an obstruction to the administration of justice so long as it is neither used nor offered for use in or near the presence of the court. Doubtless, if the deposition were used or offered for use in court, it would constitute a contempt. But until some use is made, or is sought to be made of it, having a tendency to obstruct the administration of justice, no contempt has been consummated."

A third class of cases consists of those where the respondent sought to have another person attempt to influence a member of a jury or a witness. There are several such cases and in not one of them was the respondent held guilty of contempt of court.

In *United States* v. *Carroll*, 147 Fed. 947, the facts were that Carroll had sought to get one Hopkins to influence one or more of the members of a jury sitting in a case to which Carroll's brother was a party. Hopkins never agreed to do anything for Carroll nor did he do anything in the way of endeavoring to influence a juror. The court held that this conduct, while reprehensible, did not amount to contempt of court, saying at page 954:

"Thus again indicating that the act put forth must itself have the direct and natural effect to obstruct or impede. If this be so, then the act of Carroll in endeavoring to get Hopkins to do something for him, or his brother, with the jury, which Hopkins never consented to, could of itself have no direct or sensile effect to obstruct or impede the due administration of justice. It was an endeavor which in no way reached or influenced the jury, and, therefore, tended in no way to impede justice or the administration thereof. If the endeavor had been directly with the jury or a member thereof, then it would have reached the mark; but an effort to get a third person to act, who declined, stops short of a misbehavior that is effective to obstruct, or impede justice, or to hinder its administration."

In the case of *In Re Ellison*, 256 Mo. 378, the facts were that Ellison had sought to get one Highsmith to interview a juror in a trial then pending and to do what he could with the juror for the plaintiff in the case, as stated in the citation "intending and attempting to improperly and unlawfully influence said juror and through said juror the jury in said cause." The Supreme Court of Missouri found that while this conduct was in violation of certain penal statutes of the state, it did not amount to contempt of court, saying at page 385:

"All of the authorities seem to agree that a court of general jurisdiction has the inherent

authority to punish for contempt any person who wilfully or wantonly attempts by any means whatsoever, to improperly influence a juror in the impartial discharge of his duties as such, whether by conversation, attempt to bribe or to exert any undue influence with an officer in the selection of the personnel of the jury. (9 Cyc. 16, par. 2, and cases cited).

"But after a careful reading of the numerous cases there cited I have failed to find a single case where the court has punished a person, as in this case, where he in no manner approached, discussed, or offered to bribe the juror or officer in person. In other words, the courts seem to attach to the words, 'to attempt to influence a juror,' the meaning that the contemnor or his representative must approach the juror in person before the contempt is completed.

"In the case at bar the appellant requested Highsmith to see the juror for him, but Highsmith never did so, nor did he ever intend to so do. That being true, the juror was not influenced, nor was he attempted to be influenced in his action as a juror; but the appellant attempted to have Highsmith to influence the juror, which he never did.

"That conduct of appellant, in my opinion, after a careful consideration of all the authorities cited, and which I have been able to find bearing upon the subject, did not constitute contempt of court.

"If, however, he or Highsmith, his representative, had approached the juror and had in any

manner attempted to influence him, then clearly both of them would have been guilty of contempt; but under the facts as charged in the citation and established by the uncontradicted evidence, neither of them was guilty of contempt."

In *Ex Parte McRae*, 45 Texas Crim. Rep. 285, 77 S. W. 211, the facts were that McRae asked one Hopwood who was a constable at Elmendorf about two men from that place who were on a jury, what kind of men they were, and whether they would give a big verdict against a railroad just because it was a railroad. Hopwood replied that they were good, straight men and would do what they thought was right and that he would be willing to take either one or both of them on any case against him, either criminal or civil. McRae told Hopwood, "While you are around keep your ears open and see if you can hear anything." McRae testified that he thought possibly some of them would go around talking—"some of these agents"—and if he was standing around he could hear if any attempt was made or any proposition was made to influence them and if he heard any improper question or remarks he could inform him. "I mean either to these two jurors or any of them." The court said (p. 288):

"We do not think this testimony legally authorized the court to fine relator for contempt. We do not understand the authorities to go to

> the extent of holding that the bare effort on the part of relator to secure the services of a party to find out how the jury stands in reference to a case then on trial would *per se* authorize punishment for contempt, unless the party so employed by relator should make some effort to tamper with the juror or hold out some inducement to the juror to decide one way or the other or should talk with the juror about the case with the view of ascertaining what position he occupied in reference to the testimony. * * * Because the conduct of relator does not bring him within any of the known rules authorizing this court to remand him for contempt he is hereby ordered discharged from custody."

In *Ex Parte Kemper*, 216 S. W. (Texas) 172, the facts were that the relator approached a brother-in-law of a juror and sought to have the juror corrupted by the promise to him through the brother-in-law of a sum of money if said juror would hold out for a hung jury or an acquittal. The court said (p. 172):

> "In our opinion, when the alleged contempt is an attempt to interfere with the jurisdiction or processes of the courts, and the same has never reached the point of any kind or color of communication or contact between the corruptive effort and the officers, process or matters sought to be interfered with, the power to contemn is lacking."

In the class of cases last above referred to acts had been done, actually designed and conceived for

the purpose of endeavoring to influence jurors in the discharge of their duties. Yet, because no contact was actually established with the jurors, their functions were not and could not have been obstructed. Hence, it was held there was no contempt of court. How much weaker is the case of the government here where there is nothing involved but a mere surveillance of the jury, where those making the surveillance were instructed never to approach or to have any sort of contact with a juror, and where those instructions were so rigidly adhered to that no juror was even conscious during all the time that he or she was acting as a juror that he or she was being kept under surveillance?

But take another class of cases, more akin to the one involved here. It is a matter of common knowledge that litigants or their counsel in large cities engage the services of someone to obtain information concerning prospective jurors for the purpose of enabling counsel to properly make their selections at the trial. Such preliminary investigation has never been considered contempt of court. Typical of such cases are *Castleman* v. *Continental Car Co.*, 258 S. W. (Ky.) 658, and *Wells* v. *Dist. Ct. of Polk County*, 126 Iowa 340. In the latter case the court said (p. 341):

> "The return to the writ issued out of this court makes it appear that in October, 1903, an information was filed in the District Court of Polk County, charging this plaintiff with a con-

tempt of court for that being a party defendant in a certain cause pending in said court, he had knowingly attempted to improperly influence the conduct of one John Fletcher, a juror in regular attendance upon said court, and afterwards drawn and sworn as one of the jury for the trial of such cause, by causing and procuring one F. A. Marvin to converse with said juror about such cause, the merits thereof and the verdict to be rendered therein, and to solicit said juror to favor the defendant therein in respect of the verdict to be rendered. * * *"

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"Proceeding now to a consideration of the question as made in the case before us, and keeping in mind that the specific charge in the information is that through one Marvin this plaintiff attempted to influence the juror Fletcher, it is to be said that the case rests wholly upon the following facts: That Marvin did have a conversation with Fletcher, in which the cause pending against this plaintiff was mentioned, and that improper statements were made by Marvin is conceded. On the part of the prosecution it was sought to connect this plaintiff with such improper matter by the testimony of one B. D. Stevenson, a newspaper reporter. He testified that upon a report being made by the committee of the bar of Polk County, having a relation to certain matters of alleged contempt, and as, we assume, involving the name of this plaintiff, he sought an interview with plaintiff. The latter told him that he did not know that he had anything to say

in the matter; * * * that there was nothing in the matter particular.' The witness does not pretend that any alleged conversation between Marvin and Fletcher was referred to during the interview, and was not willing to testify that the name of Marvin was even mentioned. As disclosed by the record, all that by any possibility could be claimed as of any materiality was that after refusing to talk about his own case plaintiff stated a suppositious case in substance as follows: If one man happening to meet another, who was a juryman, should say: 'Well, do what you can for my friend Wells' or something of that nature, if that was bribery, he expected bribery had been practiced. Plaintiff was a witness on his own behalf and stated that before his case was to come up in court he went to Marvin, who was an employe of the United States Express Co., to make inquiry concerning a man by the name of Fletcher, also an employe of the said company, whom he understood had been drawn on the jury. He says he did this to ascertain if there was any reason for challenging Fletcher should he be drawn on the jury in his case. He then testified that Marvin pointed out Fletcher and that he (plaintiff) responded by saying that he did not think such was the man. 'Marvin says, "Perhaps it is his father." I said, "Very likely. What kind of a man is he and where does he live?" He said, "He lives out on Fifth Street." I asked Marvin if he thought he had been against me politically. He said, "I will see." * * * Marvin did not say that he would see

Fletcher. He said that he would see; or in other words, he would find out—find out if he was against me politically. I did not understand when I left there that he was going to see Fletcher, the juryman. I did not know that he did see him until Fletcher testified to it in court.' Foregoing is the substance of all the testimony relied upon to support the judgment. To our minds it is wholly insufficient to make out a case of contempt. That plaintiff had a right to do and say what he admits having said and done must be admitted. So far there is not even room for controversy. The stating of a suppositious case by plaintiff to a newspaper reporter, standing alone, cannot be accepted as a confession tending in any degree to prove his guilt of the offense charged in the information. Contempt proceedings are in their nature criminal and before a conviction is had the proof of guilt should be clear and satisfactory."

In the light of the above authorities let us now apply to the acts of Sinclair in this case the test which this court distinctly said in the *Toledo Newspaper Company Case* (*ante*, p. 61) is the only proper test,—"*the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty.*" (Italics ours.) Again let us state what the acts were:

Sinclair employed a licensed private detective agency to keep under observation the jurors in a case being tried against him for the purpose of as-

certaining what persons, if any, came in contact with the jurors to the end that he might know if any person who might be desirous of seeing him convicted should endeavor in any way to seek contact with any of the jurors. The detectives received strict instructions that they should not come in contact with, approach or converse with any of the jurors and should not in any wise molest, interfere with, impede or influence any of the jurors in the performance of their duties as such. We repeat, these instructions were so faithfully carried out that not a single juror was even conscious during the pendency of the trial that he or she was being kept under observation.

Sum it all up and call it "surveillance" or "shadowing" or what you would please. The act neither obstructed nor tended directly, or even indirectly, to obstruct the performance of judicial duties. Indeed the character of the act carries within itself the negation of obstructive quality. Shadowing is inherently opposed to contact and without contact there can be no obstructiveness. Shadowing has no tendency at all; it simply remains shadowing. The trial court apparently proceeded on the theory that shadowing a jury has a necessarily inherent obstructive effect. In this we think the court here fell into the same error in respect of shadowing as did the lower court in *Ex Parte Hudgings* in respect of false swearing. In the latter case this court said, p. 383 (249 U. S.):

> "But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing."

In the instant case the trial court seems to have been persuaded to this view merely because a mistrial was in fact declared. Assuming for the purpose of the argument that the shadowing of the jury was the cause and even the proximate cause inducing the court to declare the mistrial,—assuming that the trial court had the power within his discretion to declare a mistrial because of the shadowing,—still, it does not follow that he had the power to punish for contempt of court those responsible for the shadowing. The trial court in the *Hudgings case (supra)* had a right to believe, if he chose, that the witness was swearing falsely and might have relied on such a belief within the sphere of his proper duties, but that belief gave the court no power to punish the witness for contempt, because, said this court, "false swearing has no necessarily inherent obstructive effect." We earnestly insist that jury shadowing has no necessarily inherent obstructive effect, even though (which we deny) it might have moved the court acting within his discretion, whether wisely or unwisely, to declare a mistrial, and the fact that the court did declare a mistrial does not react to give the act of

shadowing a necessarily inherent obstructive quality which it did not possess before the mistrial was declared.

If it had no such quality it could have no *tendency*, directly or even indirectly, to impede or obstruct the performance of judicial duty. What, indeed, is the meaning of the word "tendency" as applied to criminal offenses?

In the recent case of *People* v. *Rizzo*, 246 N. Y. 334, 158 N. E. 888, the evidence disclosed that Rizzo and three others intended and planned to rob one Charles Rao of a payroll which he was to carry from a bank for the United Lathing Company. They started out in an automobile, two of them armed, looking for Rao. They went to the bank from which he was supposed to get the money and to various buildings being constructed by the United Lathing Company. At one building Rizzo jumped out of the car and ran into the building, thinking that he would find Rao in that building, whereupon he and his confederates were arrested by police officers who had followed them. The would-be robbers had not found or seen the man they intended to rob. The question was whether these facts constituted the crime of an attempt to commit robbery and the appeal involved the interpretation of Section 2 of the Penal Law of New York which prescribes "an act, done with intent to commit a crime, and *tending* but failing to effect its commission, is 'an attempt to commit that crime.'" (Italics ours.) The Court of Appeals of

New York held that appellant had been wrongfully convicted and said (p. 336):

> "The word 'tending' is very indefinite. It is perfectly evident that there will arise differences of opinion as to whether an act in a given case is one *tending* to commit a crime. 'Tending' means to exert activity in a particular direction. Any act in preparation to commit a crime may be said to have a tendency towards its accomplishment. The procuring of the automobile, searching the streets looking for the desired victim, were in reality acts tending toward the commission of the proposed crime. The law, however, has recognized that many acts in the way of preparation are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to the consummation. *The law must be practical, and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference.* The cases which have been before the courts express this idea in different language, but the idea remains the same. The act or acts must come or advance very near to the accomplishment of the intended crime." (Italics ours.)

Applying that principle to the case here, can it be said that shadowing of a jury, without more, is so

near to the accomplishment of an obstructive act that in all reasonable probability the act would have been committed but for timely interference? There is nothing in this record from which even an inference may be legitimately drawn that the shadowing would have led to contact with a juror but for timely interference or otherwise. Merely shadowing a juror is not only not "very near" but it is remote from and negatives actual contact with the juror.

In the New York case, *supra*, the defendants intended and were preparing to commit a crime and actually looking for their victim, but the court said that they did not come near enough to accomplish it to be guilty of even an attempt to commit it. How much less in this case did respondents, not intending to establish a contact with any juror, come near to accomplishing such a contact?

We have submitted, and we confidently assert, that the mere fact that a mistrial was declared in the case of United States v. Fall and Sinclair (referred to in the petition) by the court acting within his discretion because of the shadowing of the jury by respondents, does not and cannot give to the act of shadowing an inherently obstructive quality; in other words, that jury shadowing must be measured by the test of necessarily inherent obstructive character regardless of whether or not it was the cause of the mistrial being declared and that the declaration of the mistrial could not give it such a character if it did not

otherwise possess it. We nevertheless submit that the record does not sustain a finding that the shadowing *was* the cause of the mistrial, but even if it in part induced the court to declare a mistrial, it was no more than a remote cause.

This is a criminal proceeding and the relation of cause and effect should be shown to be closely knit to a far greater degree than is required in civil causes. Yet in the law of civil liability for negligence, we find that the rule requires a closer proximation of cause to effect than was here applied by the trial court in assuming to criminally punish respondents. The well known rule is that civil liability must be founded on an act which is the "proximate cause" of the injury and not on a "remote cause."

In *Salsedo* v. *Palmer*, 278 Fed. 92, 96, the Court of Appeals for the Second Circuit quoted, with approval, the language of the Court of Appeals of New York in *Laidlaw* v. *Sage*, 158 N. Y. 73, 99, as follows:

> "A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the

> connection between which and the effect is uncertain, vague or indeterminate. • • • The proximate cause being given, the effect must follow. But although the existence of the remote cause is necessary for the existence of the effect (for unless there has been a remote cause there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow."

We respectfully urge that the connection between the shadowing of the jury and the declaration of the mistrial is most uncertain, vague and indeterminate. The petition alleges that the mistrial was declared "because of the fact that sworn charges had been made against the said Edward L. Kidwell, Jr., one of said jurors, to the effect that he, the said Edward L. Kidwell, Jr., while said trial was in progress, to wit, on the 29th day of October, 1927, outside of the court room where said cause was being tried, to wit, at No. 411 Four and a Half Street, Southwest, in the city of Washington, in said District of Columbia, had made remarks in the presence and within hearing of J. Ray Akers and Donald Kay King concerning his attitude and intended action as a juror aforesaid towards the issues on trial in said cause; and sworn charges, also, to the effect that there were a large number of operatives of the William J. Burns International Detective Agency of New York, then engaged in the District of Columbia, since October

18th, 1927, in a close, intimate, objectionable, and improper surveillance and investigation of the jurors aforesaid and the relatives, neighbors, and friends of said jurors." (R. 2-3).

The record shows indisputably that the whole matter relating to the juror Kidwell was instigated, engineered and consummated solely by persons in no way connected with any of the respondents and entirely without the knowledge of any of the respondents. The persons who so instigated the Kidwell matter knew nothing of the jury shadowing. Indeed, the record is devoid of anything to show any connection, direct or indirect, between the Kidwell matter and the shadowing of the jury. Much less does it show that the Kidwell incident resulted in any way from the shadowing. Yet the trial court in its decision said, "If it had not been, for aught that appears in this case, for the surveillance, there would not have been the incident regarding the juror Kidwell." (R. 857). The record does not and cannot support such a finding. The record affirmatively shows that the incident regarding the juror Kidwell happened entirely independently of the surveillance. [Testimony of Kidwell (R. 492-498); testimony of Akers, (R. 516-526); testimony of King, (R. 595-613.)] There is not a scintilla of evidence to the contrary. If the trial court meant that he would not have declared a mistrial because of the Kidwell incident if there had been no surveillance, that fact

or state of his mind would not of course appear in this case. But it remains true in our view that the only contempt of court disclosed by this record was that of the persons connected with the Kidwell incident.

Whether the alleged conversation between Kidwell and a newspaper reporter and the subsequent publicity given thereto should have moved the court to declare a mistrial is not for us to say, but the records shows that the Kidwell incident was the first ground for the declaration of a mistrial, as alleged in the petition in this case. (R. 2-3). Moreover, the record discloses that counsel representing the government in the case of United States v. Fall and Sinclair, in which a mistrial was declared on November 2 (R. 2), knew of the shadowing of the jury on October 24 (R. 646),—at least a week before the matter was laid before the court. The record further discloses that after government counsel learned on October 24 (R. 646) that the jury was being shadowed, the trial proceeded without any indication or suggestion of the administration of justice being in any wise obstructed, and it was not until after the occurrence of the Kidwell incident on October 29 that the court was apprised (by affidavits filed October 31st) (R. 600) that the operatives of the Burns Detective Agency were engaged in shadowing the jury, although from and after October 24 government counsel were in daily telephonic communication with one of the operatives engaged in

the shadowing. (R. 654). In the light of this state of the case, as disclosed by the evidence, we do not think it can be successfully contended that the shadowing of the jury was the cause of the mistrial, nor do we think it can be presumed that government counsel would not have apprised the court of the Kidwell matter had it not been for the surveillance of the jury.

The only proper conclusion to be drawn from this record is that the Kidwell incident was the proximate cause of the declaration of the mistrial and the shadowing of the jury at most only a remote cause. We think this is deducible even from the decision of the trial court wherein it is said:

> "If it had not been for that surveillance, from aught that appears in this testimony, there never would have been a mistrial in this case, a surveillance that *at least in part, together with the publication of the affidavit regarding it, but at least in part*, necessitated a mistrial." (R. 855). (Italics ours.)

This implies that there were intervening causes and in effect makes the shadowing of the jury but the remote cause. The necessary connection between cause and effect constituting the prime distinction between a proximate and a remote cause is totally lacking because the declaration of a mistrial is not a necessary effect of shadowing the jury unless there is in the act of shadowing a necessarily inherent obstructive quality and as we have here-

inbefore pointed out, that is the sole question in this case.

In our view the trial court not only overlooked or misconceived the essential characteristic of the obstructive tendency underlying the contempt power or mistakenly attributed a necessarily inherent obstructive effect to jury shadowing, but also misconceived the very character of the contempt proceeding before him.

Moreover, the trial court appears not to have considered that this was a case of criminal contempt, and ignored the rule respecting the measure of proof necessary to support a conviction in such case. In *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, this court said, through Mr. Justice LAMAR (p. 444):

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

In and by the petition the United States undertook the prosecution of the respondents for a criminal offense based upon Section 135 of the Penal Code. The District Attorney presented, and the trial court seems to have entertained, the whole cause as though it were a prosecution under that section, but without a trial by jury. This—in the

very teeth of the doctrine enunciated by this court in the *Toledo Newspaper Company Case*, *supra*, and in *Marshall* v. *Gordon*, *supra*, and interfering with "the great guaranties and limitations concerning the exertion of the power to criminally punish" referred to by Chief Justice WHITE in the latter case.

We have hereinbefore quoted Section 135 of the Penal Code (*ante* p. 52) and have pointed out that it and Section 268 of the Judicial Code were originally enacted together in the Act of 1831.

There is a clear distinction between the two sections. Speaking of these two sections of the Act of 1831, the Circuit Court of Appeals for the Second Circuit in *Coll* v. *United States*, 8 F. (2d) 20, 22, said:

> "It is elementary that the legislative purpose must be inferred from the entire act. The two sections are to be read together. Section 2 covers misbehavior in obstructing the administration of justice not punishable as contempts under Section 1. The United States Attorney for Porto Rico concedes that the alleged offenses of Dr. Coll might have grounded indictments and prosecution under Section 2; but his extraordinary contention is that it was necessary to proceed in such fashion as to deprive the alleged wrongdoer of a jury trial. In his brief it is stated:
>
> "'We are impelled to close this paragraph by saying that the public character, notoriety,

> and influence of those charged with contempt in this case was of such a nature that a reasonable man, knowing the situation as it then existed, would have great and serious doubt whether a jury could be found within the jurisdiction of the court below that would convict the defendants below, even for the grossest contempt.'
>
> "This amounts to urging usurpation of jurisdiction, in order to achieve a conviction thought impossible under the forms of law provided by Congress. We do not accept any such proposition."

The court further pointed out *(Coll* v. *United States, supra)* that while the power to punish for contempt is vitally necessary to courts, it is also highly dangerous, and that this court has carefully guarded the exercise of that power as evidenced by its most recent decision *(Cooke* v. *United States,* 267 U. S. 517), saying (p. 24):

> "All the implications of this latest decision of the Supreme Court concerning criminal contempt make for the construction that we give to the Statute of 1831."

Upon this point we submit that further language of this court in *Ex Parte Hudgings, supra,* is particularly appropriate. At page 384 (249 U. S.), this court said:

"Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power,—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone, without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which, in the opinion of the court, would not be perjured.

"In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore ordered that the petitioner be discharged."

Applying that language to the case here, the trial court adjudged the respondents guilty of contempt, and imposed punishment for an act which, in its view, the respondents had no right to do (R. 846), "lacks a moral quality" (R. 847) and "has a most sinister aspect" (R. 848), without reference to any circumstance or condition giving to it an obstructive effect.

It is claimed by the government that the record discloses several instances of acts on the part of the Burns agents and on the part of one respondent which went beyond the mere shadowing of a jury. These claims as set out in the petition are:

> (1) "That said operatives, after said Juror Kern was sworn, and while serving as a juror in the said cause, at the direction of the said Charles G. Ruddy, proceeded to investigate any and all encumbrances upon the home of said Juror Kern in the said City of Washington, District of Columbia, and the operatives so detailed investigated the land records of the District of Columbia, reported in writing, and concluded said report with the statement that efforts would be made to ascertain the names of those holding trust notes secured upon said Juror Kern's home." (R. 5-6).

The evidence bearing on this claim is as follows:

The respondent **Day** testified:

> "From my standpoint, Kern and Kidwell were not depicted in Government's Exhibit 1 as ex-

actly the most model subjects. This showed that Kern was a driver of a bread wagon and the reports showed that he was driving around in Hudson limousines or Hudson coaches and Essex coaches; he seemed to be a man who had considerable money for what I would ordinarily imagine that a driver of a bread wagon would be making." (R. 828).

"I conversed with Ruddy specifically about Juror Kern and about the investigation of him. I do not remember the date, but I remember saying to Ruddy that this man did not live up at all with the report he had handed me, Exhibit 1, and I wanted to know something about him. I think Ruddy said, 'Why don't you get a credit slip out on him.' I said, 'What do you mean by that?' He said, 'Well, as to his standing, as to his substantiality; whether he owns his home, whether he owes money every place, or just what.' I said, 'Well, that is a good idea. Do you do that investigating?' He said they did. I said, "Where do you start?' And he said, 'I generally start to look up a man's home, whether he owns it, whether it has an encumbrance on it.' I said, 'Well, suppose you do that.' I came in contact with Britton Browne at 2118 Leroy Place, shortly after that talk with Ruddy. I asked him how to look up a mortgage to find out about a man's encumbrance. He said, 'We do that every day. That is normal in the real estate business. We have definite, specific people to do that. And if you would like to avail yourself of the services of these people there,

naturally you can do so.' I saw Mr. Browne at his office. I told him I had come into see him but didn't find him. I therefore applied to a man who was there relative to a mortgage, or if there was a mortgage on a certain piece of property. He asked me who it was, and I said I thought it was Mr. Dove. He asked me if Dove gave me the information. I said no, but that he said that he would through his regular channels obtain this information for me. Mr. Browne asked in the office if they had obtained certain information which I wanted. They stated that they had handed me a slip of paper saying that there was a mortgage of some $4,000 or $5,000 on a certain piece of property, and that the mortgage was in the name of Kern and somebody else. Mr. Browne said, 'Who has this mortgage?' I said I didn't know. He said I must find out. He then referred to somebody to find out who held the mortgage and how much it was. The information came back and he told me that the mortgage was owned or held by a Building Loan Company, that it had been reduced and was being reduced by the payment of $40 a month. I said to him, 'I am very suspicious of somebody, one of our competitors, or one of our enemies, or somebody paying this off. And I would like to be advised if anybody did pay it off.' * * * I think I told Mr. Browne that Kern was one of the jurors in this case, and that that was why I wanted this information. From my standpoint I did everything openly and above-board. I first addressed a clerk I had

never seen before in my life. * * * I did not, in this investigation of Kern, nor at any time before that investigation, nor at any other time have in mind any purpose or thought of directly or indirectly making contact with Juror Kern. Absolutely not. Under no circumstances." (R. 830-31).

"It was approximately October 26th that I began to make my own inquiries as to the encumbrance on Kern's property. That was due to the reports that I had received on Kern up to the 25th, and due to my having met in the Mayflower Hotel a certain individual that I had always been very suspicious of. On the 25th or 26th I definitely made up my mind that it was important to ascertain what the character and extent, if any, of the encumbrance on Kern's property was. * * *" (R. 833).

"I did not report to or consult with Mr. Sinclair with respect to the directions which I gave and my own steps which I took to ascertain the encumbrance on Kern's property. I did not see him. * * * I think the trial was over when I took it up with him. I never received O'Reilly's report, which was read in Court relative to that morning. I considered the matter closed when it was a Building and Loan Association, and I was to be notified by Mr. Hagner or Mr. Browne if anybody tried to pay it off. Hagner had not given any instructions, but I had said that I would like to know if it was paid off by anybody. I was suspicious that somebody would. I did not give definite instructions to Hagner &

Company to watch the records to see whether or not the mortgage was paid off, but I would certainly have gone back there later on to find out if anybody did. I did not go back because a mistrial was caused, and I had left Washington. I did not anticipate that Hagner & Company would keep me informed as to that." (R. 834).

The witness **Ruddy** testified:

"I was asked by Mr. Day, around the 26th, the best way to find out how responsible juror Kern was as he believed him irresponsible. I told Mr. Day the best way was to make a general credit check on the man. We do it constantly. I said to see whether he owned his own home and whether he met his obligations, and Mr. Day said that he was particularly anxious that we should find out if there were any encumbrances on the property, and if any of them had been recently paid off. I instructed O'Reilly to find out whether Mr. Kern owned his own property, and to make a general credit report on him. O'Reilly reported back in writing that Mr. Kern and his wife owned their own home jointly and that no encumbrance had been recently paid off. He did not learn whether there were any encumbrances on the home. This report was rendered in writing by the operative, but never reduced to a typewritten report to be handed to Mr. Day and I never reported it to him personally." (R. 87-8.)

"I testified yesterday that Day had asked me to make a report to him on the responsibility of Juror Kern, but that I had not made the report. The report refers to 1315 North Carolina Avenue, the home of Juror Kern. This paper is a report of the early part of the investigation of the responsibility of Juror Kern. Following Day's instructions I caused an investigation to be made into Juror Kern's responsibility. • • • I did not communicate the contents of the report to Day, nor did I send it or communicate its contents to Sherman Burns. It was among the papers seized under the search warrant executed October 31st. This is dated the 28th. I had made edited reports of reports that had been made to me on October 28th, 29th and 30th. I had covered all with the exception of this one. I did not reach this one because of the question in my mind as to whether it did not exceed the instructions that I had received from the agent. Day told me that he was very anxious to find out about Kern's responsibility. I told Day that the best way to obtain the information as to the responsibility and reliability of Kern was to make a credit report. That was the logical way to establish it. There are a lot of people well off financially that do not meet their financial obligations. Part of what Day wanted me to find out was whether Kern met his financial obligations. Day didn't make any statement, or mention the word 'financial.' I have no doubt about what Day wanted to know." (R. 203-4.)

"I have already testified that Day spoke about wanting to find out the responsibility or the irresponsibility of Kern. That was about the 26th of October." (R. 373.)

The witness **O'Reilly** testified:

"Sometime during the morning of the 28th Ruddy assigned me to make a credit investigation of Juror Kern. Up until this time I do not believe that Ruddy or any of the operatives had spoken to me about Kern. Ruddy told me to find out, if I could, in my own way, as to the responsibilities of Kern. He told me to find out if he owned his own home, and if so, to make an investigation if the mortgage had recently been paid off. I did not ask Ruddy what he meant by the word 'responsibility.' I was given instructions that I thought were definite enough. I thought from my experience that I knew what he meant. I went to the District Building to first obtain the ownership of the premises where Juror Kern lived. I believe Ruddy had given me the address as 1315 North Carolina Avenue, and I think I made a very crude memorandum of it on the back of some envelope. I reported to Ruddy everything I ascertained during this investigation. I first learned that the premises were owned by Kern. I then made inquiries as to where I could find out if there was any existing mortgage on this property. I was directed by the clerk to go to the Recorder of Deeds' office on Fifth Street, where I attempted to make a search of the books which were avail-

able there to the public, and after going back about two or three years I found nothing there that was recorded to correspond with the name Kern or with this property 1315 North Carolina Avenue. I asked one of the young ladies if it was possible to obtain the history of this house, as to what the mortgage might be, or who the tenants were, or who the landlord was, and she said this was not possible unless I knew when the property was purchased or taken over by the present owner. I returned to Wardman Park and made a verbal report to Ruddy that unless some definite time could be stated as to when this property came into the possession of Kern it was almost impossible, from the records available there to make a thorough investigation; but that I had satisfied myself that back to January 1, 1927, no release or satisfaction price had been issued against that particular house in the way of payment of the mortgage, trust receipts, or whatever it was." (R. 421-2.)

The witness **Browne** testified:

"Day asked me where he could look up a mortgage on a property, and I offered the services of our office, the Randall Hagner Company. Several days later, Day came to the office and got the information. I saw him in the office after that. I am not sure whether I saw him that day or the next day. I saw him in the office only once. At that time I did not discuss with him the information that was given to him relative to the mortgage. Later he spoke to me

about why he was looking up the information. If he did tell me who was the owner of the property I do not remember the name. He did not tell me where it was located. He did not tell me what he wanted it for before the trial was over. At the time he asked about the mortgage, I suggested that he come in the office and we could find out about the property, as to whether or not it had a mortgage on it, but he didn't say anything about what he wanted it for." (R. 389.)

The witness Browne further testified on cross-examination:

"There was nothing unusual in my visit to Woodward's house when I met Day there. It was in Woodward's house that Day first spoke to me about how to look up a mortgage. It was one afternoon on the way home when I dropped in there, and it was just an offhand question. I had seen him in Washington frequently before that. He asked me how to find out whether there was a mortgage on a piece of property. I suggested the recording office, and then I said that we would be glad to look it up for him in our office, that we were doing that every day, that we had a man there, Anderson, who would be glad to look it up for him. I told him that I would be glad, if he saw fit, to have him avail himself of the facilities of my office • • • I was out when Day came to my office for that information. He got the information • • • I talked to him afterwards about the informa-

tion. I asked him if he got the information and he said that he had. Later he told me why he wanted the information. He did not at that time tell me what the information was that he had received from my employees. He told me the information showed that there was a mortgage. I told him that he had better find out what the present mortgage was, that it was a building association mortgage. I told Anderson, our settlement man, to find out the present status of the mortgage. I think he did it, but I do not know. Later that evening Day volunteered the information why he wanted it." (R. 389-90.)

The witness **Dove** testified:

"Day came in and asked to see Brown. I told him Brown was not in. I asked him if there was anything I could do for him. He said that he would like to look up a piece of property, and we then went over to the plat book and looked up the property. He told me it was 1315 North Carolina Avenue. I turned to the plat book to find out. He was with me at the time. We got the lot and square number. He did not tell me who the owner of it was at that time. He wanted to know whether there were any encumbrances on the property, and I told him I didn't know, but could find out. I told him he could get it from the recorder's office. So he asked me if I could have that done for him and I told him yes; that we would have Anderson do it. I told him I would have to try to catch him downtown by phone, that he was out of the

office. I waited a while to see if I could get Anderson, and then I had to go out, so I gave the memorandum, of the lot and square number of the property, and asked the operator to get the information, or to have Anderson get the information. I got the information later that day. The operator gave me a memorandum of it when I came back. I do not know whether I gave the memorandum back to her or not. I had to leave the office again and Day had not been in, so I gave it back to her and asked her to give it to him, or give him the information when he came in. It showed a first mortgage on the property. I think in the amount of $4,000, although I cannot say exactly. Kern was the name of the owner of the property. The mortgage was held by some building and loan association. I do not remember the name of it. I was not asked to find out who was the holder of the mortgage. Day asked me to find out if there were any encumbrances on the property, and if so, what. He did not ask me to whom the mortgage was secured. He did not ask me who the mortgage was made to. When he came in I told him the amount of the mortgage, by whom it was held, and that he could not be positive whether that was the amount at present, because these mortgages were payable so much a month, or at different periods, as a rule. I showed him who the owner of the property was from the assessment book before I sent for the mortgage information. He then told me he wanted the report later that day. * * *"
(R. 390-91.)

The witness Dove further testified on cross-examination:

"I knew, when he came into the office, that he had, for many years, been an intimate friend of both Donald Woodward and Britton Brown. That knowledge made me a little more anxious to serve him, but I would have done so anyway. He asked me if Brown was in. I told him no and asked him whether there was anything I could do for him. He said he wanted to look up a piece of property. He gave me the address, and we looked it up on the plat book, to get the lot and square number. He did not give me the name of the owner. In fact, I showed it to him from the assessor's book. The plat book is in the back part of the office. It is perfectly open and not in any secret place. Our conversation was not subdued, but could have been heard by anybody who was near. While at the plat book I simply located the house on the plat, and then got the number of the lot and square, and then referred to the assessment book. I asked Mrs. Rawzer, the telephone operator, to get in touch with Anderson. Her desk is in the front part of the office, near the street. I went up to her to talk with her about Anderson. Day had then gone, because I had to go and get Anderson, and Day left. I told Day before he left, that I would get this information for him if I could locate Anderson downtown, but that sometimes we couldn't get him. Part of the information that I gave Day was that the amount recorded against the property was, as I remember, some-

where in the neighborhood of $4,000. I don't know positively whether that was the amount as of that date. It probably had been paid down, and might have been increased. I assumed that the mortgage had been paid off in part because it had been on for about a year. Most of these building associations pay by the month. Neither one of us before that had said anything about part of it being paid off. I think I volunteered the information. I don't recall whether Day said anything on that subject before. About a half hour after he went out I had to leave the office, and then I gave the memorandum to the telephone operator. I did not talk to Anderson until late that afternoon, when he came back to the office I did not talk to him about getting the information I conveyed to Day. I got that from the operator. It was in writing. I made a memorandum in my own handwriting, and as I had to leave the office again I gave her the memorandum that I had made, and told her if Day called or came in, to give him that information. That is the last I saw of the memorandum. It was not in that memorandum that I stated that I assumed that the mortgage had been, in part, paid off. That was made orally to Day later that afternoon, when he came in the office. The operator told me that he had called up on the phone, and that she had given him the information. I do not know whether or not he ever got the memorandum. I don't know what became of it after I gave it to Mrs. Rawzee. I don't know whether she gave it back and I tore it up. I am not clear

on that. I do not recall anything that Day said to me on the last occasion of his visit to my office that day, when he saw me. All I remember is that I gave him certain information. I do not recall anything that he said. I don't know whether we had any conversation. I think Brown was in at that time, and I think he went back to see him, and I simply volunteered that information, as I remember." (R. 392-3.)

The witness Dove further testified in response to questions by the court:

"There was only one encumbrance on the property we found from the personal records. That was a first trust of $4,000. That is the one I talked about. We distinguish between a first trust and a second trust. In this first investigation as to the encumbrances on the property, we found but one encumbrance. I did not ascertain that there were any others at that time upon that particular property. We have copies of the assessment book in our office. The plat books that we have in our office are supposed to be correct copies of the original plat books on record in the Surveyor's office. If I have the number of the premises I can get the precise block and square and lot. The assessor's book shows the ownership and the amount of assessment on the property. While Day was with me on this occasion in my office I consulted both the plat book and the assessment book, therefore ascertaining the lot and block description of the property, and also in whose name it appeared in the assessment book." (R. 393).

The witness, **Mrs. Irene Rawzee,** testified:

> "Mr. Dove asked me to locate Anderson and find out from him some information about a piece of property at 1315 North Carolina Avenue, in the name of Kern. • • • I gave him this information, and he called me back and gave me the information, and I wrote it on a piece of paper. I told Anderson to find out who held the trust, when it was obtained, and anything else he could find out about it. Anderson said the trust was gotten in 1922, by the Columbia Loan & Building Association, for $4,000. Made a memorandum of that and gave it to Mr. Dove when he came in. He gave it back to me and told me to keep it, because he thought he was going out again. I gave the memorandum that Mr. Dove gave me to Mr. Day, that same day when he came in. I had no conversation with him about it. • • •" (R. 394).

On cross-examination, the witness, Mrs. Rawzee, testified:

> "When Mr. Dove came to me and asked me to get in touch with Anderson, Mr. Day had been in the office just previous to that. I don't know whether he was there just at that minute. I don't know whether he had gone out before Mr. Dove came to me. I didn't see him there at the time. The instructions I gave Anderson were those that I got from Mr. Dove, to find out the encumbrance on this piece of property, and who

held the mortgage, and when it was obtained, and anything else he could find out. I don't know whether he particularly wanted to find out whether, if the mortgage existed, it had been paid off, either in whole or in part. Mr. Dove said to find out who held the mortgage, how much it was for, and when it was obtained, and who held the title. In the course of half an hour after I communicated with Anderson he called back. He was at the title company when he called. I wrote down all that he said. The information was that it was obtained in 1922, for $4,000, and the Columbia Building & Loan Association held the title. I handed that paper to Mr. Dove as he came back to my desk, and he just read it and gave it back to me. I ultimately gave it to Mr. Day, about an hour after Mr. Dove had seen it. Mr. Dove was not in the office when Mr. Day came in. He went back to see Mr. Brown, as I remember. Mr. Brown was in. I gave him the paper as he came in the door. He made no comments on it in my hearing. At no other time did I give Anderson any further instructions on this same subject. No one in the office talked with me about it, nor did Mr. Day." (R. 394-5).

The witness **Anderson** testified:

"I remember receiving a telephone message from Mrs. Rawzee asking me to get a report relative to certain property. I don't remember the exact date. I know it was sometime in October. I do not remember what the property

was that I was asked to look up. It came to me by lot and square number. I don't remember whether I was told what street the property was on. I never learned the street. I was at the District Title Company when I got the message, and I went to the records to get this information. I found there was a trust on with the American Building Association for $4,000. That is the one thing I remember. I do not remember when that was made. I should say that it was about two years off; the maker of the trust was named Kern. I don't remember his first name. I called Mrs. Rawzee back on the telephone as soon as I got the information." (R. 395.)

The witness Anderson testified on cross-examination:

"I made no other or further investigation at a later time. Later in the afternoon in the office, Mr. Brown asked me if I could find out the amount due and I called the building association to find out about it. Mr. Day was in the office at the time I called the building association for the amount due. I did not talk to Mr. Day about it. I never had a word of communication with him about it. Mr. Brown asked me to get the information relative to the balance due on the trust. He was in his office and I was sitting at my desk, which is next to his private office, just back of this door, and he called out to me to get the information. Mr. Day was there at the time with him. When I got the information I went in the door and told him. Mr. Day was there at that time." (R. 396).

The petition of the government further alleged:

(2) "That said operatives, acting under the direction of the said Charles G. Ruddy as aforesaid, investigated neighbors of said Juror Kern and reported that J. E. Vogts, a next-door neighbor of Juror Kern was reputed to be 'well fixed as to money,' having recently sold his home, and was represented to have made a thousand dollars in four days on one occasion as a result of granting favors relative to the shipment of corpses during the influenza epidemic while said Vogts was freight agent for two railroads." (R. 6).

The evidence bearing upon this claim is as follows:

The witness **Ruddy** testified:

"A report was made as to a man named Vogt, a neighbor of Kern, and communicated to Mr. Day. My instructions were for the men to take the numbers of any automobiles that might be seen with the subject. When we received these numbers of automobiles we had them looked up at the Registration Bureau. In this case an automobile appeared in the man's report and another investigator was sent to find out who it belonged to, and it was found to belong to a man named Vogt, whose address was not that of a neighbor of the juror. In some neighborhood gossip the facts that are in the report regarding Mr. Vogt were brought out. That was

all that was done in the matter, and it was not used for any other purpose." (R. 87).

The witness **O'Reilly** testified:

"Ruddy asked me to visit operatives Steer and Brennan, who, I believe, were at the Plaza Hotel. I went there and assigned Steer to find out who some people by the name of Vogts were. They owned an automobile which had been reported in a previous operative's report. I assigned Steer to find out who this man who owned the automobile was. I did this at the direction of Ruddy. He did not tell me why." (R. 409).

"I reported that I had assigned Steer from the Plaza Hotel to investigate this party known as Vogts." (R. 410).

The witness **Steer** testified:

"O'Reilly come to the Plaza about 1 o'clock. • • • O'Reilly gave me a license number, N-5259 and the address of G. J. Vogt, at 1411 North Carolina Avenue. He told me this car belonged to Vogt. 1411 North Carolina Avenue is about three blocks away from Juror Kern's home. I went out there and found Vogt had moved about six months ago to 1317 North Carolina Avenue, next door to Juror Kern. I learned from a lady who lived two doors from 1411 North Carolina Avenue that Vogt had moved. I went up and rang her door bell and fell into a general conversation, and gradually led her around to the Vogts. I asked her about

real estate values in that neighborhood. I did not tell her my name or business. I did not ask about the price of Kern's house. We were talking in a general way, and then we got talking about the Vogts. She said, 'Well, Mr. Vogt moved away from here six months ago, and he sold to the people who now occupy it for $7,750.' I was by myself. I asked her if she knew the people in 1411, and she said she did not as they were new people in the neighborhood. I just said, 'How are real estate values around here?' She asked me if I was thinking of buying a house, and I said that possibly I might, but I wanted to know what the values were. We talked along that line, and I asked her if she happened to know a family by the name of Vogt who used to live at 1411. She said they were good friends of hers, who had lived there for 8 or 9 years. I asked her what Vogt was doing now and she told me that he was freight agent for the B. & O., and worked with the Government at night as an accountant. She did most of the talking. She said he made $1,000 in four days during the influenza epidemic shipping bodies through. O'Reilly gave me no information about Mr. and Mrs. Vogt. He sent me there to get information. I left the lady and went to the vicinity of Vogt's home in order to get a good flash at him in case anything should come up later on in the operation concerning him. In case they wanted me to shadow him I would know him. O'Reilly had said nothing to me about the necessity of shadowing Vogt. He did not know anything about it. I do not know

what relation Vogt had to the case. O'Reilly did not ever tell me that Juror Kern's sister had married a man by the name of Vogt, and I never knew it. He gave me no explanation as to why he wanted me to go over and look up the Vogts. I do not know the name of the woman I talked to on this occasion. Her house was on the same side of the street as 1411, and two doors away from 1411, away in the direction of the Capitol. I interrogated one or two neighbors of the Vogts in addition to this woman. I do not know their names, or street addresses. The first place I went to I asked if the Vogts lived there. I knew they did not. I did not tell them who I was or what my business was. I did not have any conversation. If they said no I would go away. If they knew the Vogts they would tell me where they were. I did the same thing at the second place I went to. I would say that I wished I knew where the Vogts lived as I was very anxious to get hold of them. I did not say why I wanted to see the Vogts. That is the strong pretext I have reference to in my report. Aside from this woman, neither of the other two persons I talked to gave me any information about Vogt or Kern. The name of Kern was not mentioned at the places I went to. When O'Reilly gave me Vogt's address and car license he did not tell me where he got that information. I knew the night before that the Vogts did not live at 1411 North Carolina Avenue, but lived at 1317, next to Kern. I had been in that neighborhood the night before. The transactions of

this day do not bring back to my recollection anything further with regards to the instructions I had received the night before at the Mayflower. My first information from O'Reilly about the residence of Vogts came at the Plaza Hotel in Brennan's presence. The woman near 1411 gave me the information that Vogt is thought by neighbors to be fairly well fixed as to money. By neighbors I mean that woman. At the time I got my instructions from O'Reilly I was not told to get a complete report as to the financial condition of Vogt. I just got it to get general information. O'Reilly did not tell me what kind of information he desired on the Vogts. I stayed in the vicinity of 1317 North Carolina Avenue until 9:40 p. m. There was no other agent with me. I was watching just Vogt's house and not Kern's. I did not see Kern that night. I was not looking for him but for Vogt. I did not see Vogt. My instructions were not to remain there and cover Vogt on that occasion. I did that for my own information." (R. 538-40).

On cross-examination, the witness Steer testified:

"I do not know why I was instructed to make inquiries about the Vogts. I don't remember any information given me that Kern had been seen in Vogt's car. All I did was to follow O'Reilly's instructions to find out something about the Vogts. He didn't tell me anything about them. I was not instructed to find out

anything about their financial condition. I just wanted to get a general knowledge of who they were and what they did. The name of Kern was not mentioned at all. I first went to 1411 North Carolina Avenue to find Vogts. I thought they lived there. I found out from this elderly woman from whom I got this information, that they had moved to 1317 North Carolina Avenue. When I went out there to do what O'Reilly told me, I did not know they lived at 1317. He told me they lived at 1411. I only asked about them in a general way." (R. 544).

The witness **Kern** testified:

"I have a sister who married a man named Vogt about 20 years ago. Vogt is not living at this time. There is a family named Vogt living next door that is no relation to the Vogt family my sister married into." (R. 556-57.)

The petition contains the further allegation:

(3.) "That an investigation was conducted by the said operatives, under the direction of the said Charles G. Ruddy, with regard to the brother or father of the said Juror Kidwell, and reported in writing that the said brother's or father's place of business was located on questionable premises and that racing sheets were found in the trash thrown out of said premises." (R. 6.)

The evidence bearing on this claim is as follows:

The respondent **Day** testified:

"From my standpoint, Kern and Kidwell were not depicted in Government's Exhibit 1 as exactly the most model subjects. • • • The reports showed that Kidwell always was with 3 men. He left the court house with 3 men, or he joined 3 men, or there were 3 men waiting for him. Mr. Sinclair stated that he thought my suspicions might be well grounded; • • • that it might be a good idea to find out if Kidwell and Kern were really substantial citizens. He told me to keep 2 or 3 men and let the rest go. I got in communication with Ruddy on that subject either late Sunday afternoon or Monday morning. I told him to let all the operatives go immediately, and simply keep 2 or 3 men to work on the Glasscock episode and to continue on Kidwell and Kern. I just gave general instructions. I did not at that time, or at any other time, have in mind or contemplate the making of any contact with any juror, or to approach any juror directly or indirectly, or to affect any juror one way or another, or to accomplish a mistrial, or to accomplish any kind of influence over any juror; not under any conditions; I did not know anything about O'Reilly's visit to Kidwell's residence. I did not in any way suggest it. I did not know that he was going there before he went. I first knew he had been there when Major Gordon read in Court the original of the so-called edited report, which was given to me, relative to his investigation of Kidwell, the barber. I said

something to Ruddy about getting a designation on Kidwell's brother, the barber. I said, that according to the list of jurors, which is Government Exhibit 1, it stated that Kidwell had a brother, a barber. I wanted to know if he was employed as a barber in any of the prominent Washington Barber Shops because of the experience that I have had in going into barber shops, barbers are probably the greatest talkers in the world about their business and other people's business. I wanted to know if this man was employed in any of those shops where he might be promiscuously talking about this trial or in any way was expressing anybody's ideas about the trial, with the clients that might come in. I was not at Wardman Park on the afternoon of October 24. I arrived there after dinner, sometime between 8 and 11 p. m., and went to Ruddy's room. I saw a man standing by the bureau, and Ruddy and he were in conversation. I heard some of it; practically none of it. I heard this man, whom I afterwards found to be O'Reilly, and whom I did not know and was not introduced to at that time, say it was a disreputable barber shop, up on a hill in a disreputable hotel. I did not talk with O'Reilly at all myself." (R. 828-29.)

"Mr. Sinclair made inquiry from time to time about the course of the surveillance. I consulted with him in regard to the reports that I thought were of concern. I think I consulted with him about the inquiries which I directed to be made about the barber Kidwell. I could

not say whether it was before or after I had given the directions." (R. 834.)

The witness **Ruddy** testified:

"I assigned O'Reilly to investigate juror Kidwell's brother. O'Reilly made a report of his investigation and I gave that report to Mr. Day." (R. 87.)

The witness **O'Reilly** testified:

"There came a time when I went to the barber shop of a man by the name of Kidwell. And there came a time when I went to a house on U Street, Southeast, occupied by a family by the name of Kidwell." (R. 406.)

"Up to the 24th nothing was said to me, or any of the other operatives, about the Kidwell family." (R. 414.)

Speaking of Mrs. Mary Pearl Kidwell, the witness O'Reilly further testified:

"I would not state positively that I have seen that woman before. I think I may have seen her about 4:30 or 5:00 on October 24th at a house on U Street, in Anacostia. I think the number was 1637. My recollection is that there is a small porch in front of that house. I do not remember whether or not I had a top coat with me." (R. 415.)

Speaking of Edward J. Kidwell, Sr., the witness O'Reilly further testified:

"I recognize the gentleman who just came in. I saw him on October 24th about 5:00 P. M. at a barber shop in Congress Heights. It was 10 or 15 minutes after I had seen a lady in a house on U Street, Southeast.

On October 24 * * * Ruddy gave me instructions to find out where there was located in Washington a barber named Kidwell; to find out his place of business for the purpose of obtaining a description of him so as to be able to identify him, if necessary, at some later date. He told me to start my investigation in the Anacostia section of Washington. He said this barber was a brother of the juror. He did not say where this barber was located." (R. 415.)

"On the assignment given me by Ruddy about 3:00 o'clock I returned to the Mayflower where I referred to a city directory. I made inquiries as to what comprised the section of Anacostia. I had no idea of the location, and I know nothing about the streets or layout of Washington. I took from this city directory the names and addresses that I was told would appear in the Anacostia section. I went there alone, arriving about 4:15. I had heard the name Kidwell before, in what way I do not know. I had read in the papers that there was a juror by that name. When I went to Anacostia I went to a house on U Street, where I saw a woman. There was a conversation between us. Immediately after that conversation I went to the barber shop, which, I was informed in the conversation, was located in the Myrtle Hotel basement. It was there that I

saw this man whom I identified today. I had a talk with him and after that talk I returned to Wardman Park, where I saw Ruddy and Day in Ruddy's apartment. I verbally reported to Ruddy what had transpired when I was in Anacostia when I went to the U Street house and what transpired when I went to the barber shop. We were all standing in the room, which is perhaps 12 by 20 feet. Day was 4 or 5 feet from me. I do not remember where Ruddy was standing. This report was made in the presence of Day." (R. 416.)

On cross-examination the witness O'Reilly testified:

"I was sent to Anacostia for the purpose of locating and seeing a Kidwell known as Barber Kidwell. I was not asked or directed by Ruddy to locate or see or come in contact with Juror Kidwell. Ruddy told me that he thought that the barber, Kidwell, was a brother of Juror Kidwell. When I went to Anacostia I was upon the performance and execution of a particular mission that Ruddy had given to me. It was about 3:00 o'clock in the afternoon of the 24th of October. I did not seek to locate or to find out anything whatsoever about Juror Kidwell when I went there. I had never been in Anacostia before. Upon my arrival in that section that I was told was Anacostia, I made inquiries as to a barber named Kidwell in that section of individuals on the street along Nichols Avenue, somewhere after I crossed this bridge going

into Anacostia. I asked at least 5 or 6 people where Barber Kidwell lived. I was told by one individual that he believed there was a barber living on U Street named Kidwell, but he did not know what number. I referred to the list of Kidwells which I had compiled before leaving my hotel. I had in this list, as I remember, 3 or 4 who lived at number 1637 U Street which house I went to. *At the time I went there to locate Barber Kidwell I did not then know the name, or the full name and initials of Juror Kidwell.* When I went to this house, 1637 U Street, I rang the door bell. At no time did I go inside the house. I was not there more than 2 or 3 minutes. I stood on a small porch in front of the front door. When I rang the bell an elderly lady, resembling the lady I saw yesterday, came to the door. • • •

"The Myrtle Hotel is about 2 or 2½ miles from 1637 U Street. I had never heard of the existence of the Myrtle Hotel before I went to Anacostia on October 24. I first learned that there was such a hotel on October 24th, at about 4:45 P. M." (R. 428-29).

"When I went to that house in Anacostia I did not know that Juror Kidwell lived there. I ascertained sometime after I left Anacostia that this juror lived at 1637 U Street. I learned it when I returned to Wardman Park about 9:00 P. M. that night. I had no idea of it then. I did not know Juror Kidwell's initials. On the occasion of this trip to Anacostia I did not make any inquiry of anybody whatsoever between the time I went to Anacostia and the time I returned

from Anacostia about Juror Kidwell. Concerning Barber Kidwell, I was directed to learn his place of business; to go there and look at him for the purpose of being able to give another operative a designation on this man at a later date, if so desired. I found Barber Kidwell in his barber shop at the Myrtle Hotel. I did not go inside of the shop. I was there one minute." (R. 430).

"I only went to the door of the barber shop to look at him. I said something, and he said something, and I went away." (R. 431).

"I never did shadow Juror Kidwell, nor his father, nor any members of his family." (R. 432).

"Before going to Anacostia I compiled a list. I referred to the classified section of the Washington telephone book, looking for a barber by the name of Kidwell. I referred to the city directory, and having been informed as to what comprised the section of Anacostia, I confined myself to that section, and I compiled a list of probably 8 or 10 names. At the time I compiled the list I did not know the name of Juror Kidwell. I compiled the list about an hour before I went to Anacostia. On the day that I went there I first heard the name of Juror Kidwell mentioned about 3 or 3:15 that afternoon. Ruddy first mentioned Juror Kidwell to me on that occasion. It was at Wardman Park. I left there about that time. I next had my conversation with respect to Juror Kidwell on that day at about 9:00 P. M. at Wardman Park." (R. 433-34).

"When I returned from Anacostia I went to Wardman Park, where I saw Ruddy." (R. 435).

On redirect examination, the witness O'Reilly further testified:

"Prior to the time I went to the house on U Street I did not telephone to anybody to make inquiries. I have never heard of the name Teats before in my life. I stood on a small porch in the front of the front door, about 3½ or 4 feet wide. I do not know how long it was I was facing the door and not the porch." (R. 435).

On re-cross examination, the witness O'Reilly further testified:

"When I was in Anacostia I inquired of several people where Barber Kidwell lived. Those people were absolute strangers to me." (R. 437).

The witness, **Mrs. Mary Pearl Kidwell,** testified:

"I recall an incident that occurred while my son was a juror in the Fall-Sinclair case, when a man came to my house and knocked at the door. I went to the door and opened it and he asked if Mr. Kidwell was home. I said, 'Which Mr. Kidwell do you want to see?' He said, 'The Mr. Kidwell, the barber.' "I said, 'Mr. Kidwell is at the shop now, at the barber shop.' He said, 'Where is the barber shop?' I said, 'Congress

Heights, in the Myrtle Apartment.' He said, 'I do not know where the Myrtle Apartment is.' I said, 'Well, anyone at Congress Heights will show you.' He said, 'Very well.' He said, 'I have some papers here I want him to sign concerning the barber shop.' He said he did not want to have so many papers come in the first of the year to have to be signed. He said he was from the Health Department. He did not tell me who he was. He left and I have never seen him any more. I have told the Court, to the best of my recollection, all that he said to me and all that I said to him on that occasion. When this occurred, my son Eddie Kidwell was living at 1637 U Street. He did not come home from work that day. It was around 5 or 5:30, and was just beginning to get dark. I saw my son later that day about 6 o'clock." (R. 506-7).

"There was a talk or discussion between myself and my husband and my son, Eddie, about the fact of a man having been to the house, and about the fact of a man having been to the barber shop." (R. 508).

The witness, **Edward J. Kidwell, Sr.**, testified:

"I recall that during the time my son was a juror in the Fall-Sinclair case a man came to my barber shop in the Myrtle Apartment at 3109 Nichols Avenue, Congress Heights. He called there one evening between 7 and 8 o'clock and asked me if a Mr. Stewart ran a barber shop in Congress Heights. I told him no, that there had been a Mrs. Stewart who ran a beauty parlor

there, but she had left and gone to Anacostia. He thanked me, and I believe that is all he said, to the best of my recollection. That same night there was a talk between myself, my wife and my son, Eddie, about the fact that a man had been to my house earlier in the day, and about the fact that a man had been to my barber shop." (R. 509).

A careful consideration of the evidence bearing upon the investigation of the Kern mortgage and of Kidwell's surroundings clearly shows that it falls far short of any contact with either Kern or Kidwell by any one representing or acting for any of the respondents, or of any attempt on the part of any one representing or acting for any respondent to establish contact with either Kern or Kidwell; also, that whatever motive or purpose may be ascribed to those making the investigation,—whether simply to ascertain the standing and responsibility of the jurors, or something more than this,—it distinctly fails to establish the fact that there was any obstruction of or direct tendency to obstruct the administration of justice. Inasmuch as this evidence does not show any contact or attempt to establish contact with any juror in the case, we maintain that the sole question here presented is whether mere shadowing without contact or attempted contact constitutes a contempt of court.

The only other incident not embraced within the general subject of shadowing is the one relating to

the juror Glasscock (R. 5), the evidence as to this being admitted only as to the respondents Burns' (R. 621-22), and as this incident will be fully presented and discussed in the briefs of the respondents Burns' we have deemed it unnecessary to present it here.

Respecting the merits of the questions grouped under the four points here argued, we submit as we did in the beginning of the argument on these points that the law applicable falls within a very narrow compass, and is clearly announced by this court in the cases of *Marshall* v. *Gordon*, 243 U. S. 521; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402; and *Ex Parte Hudgings*, 249 U. S. 378, which cases are discussed *supra*.

From the opinions in these cases it is manifest that there can be no contempt of court unless the evidence shows acts done which obstructed the administration of justice or which had a direct tendency to obstruct the administration of justice. The evidence in this case falls far short of the requirements as announced in the cases cited.

In the case of *Marshall* v. *Gordon*, *supra*, at p. 541, (243 U. S.) Chief Justice WHITE, discussing generally the power to punish for contempt, said:

> "The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end, and not the end itself. Hence it rests

solely upon the right of self-preservation to enable the public powers given to be exerted."

The case of *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, *supra*, clearly demonstrates that the principles of law for which we are contending are sound. In that case, Chief Justice WHITE, discussing the various statutes under which this case was prosecuted, said (p. 419):

> "• • • The provision (of Sec. 268 of the Judicial Code), therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly. *The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty,*—a conclusion which necessarily sustains the view of the statute taken by the courts below and brings us to the second question. • • •" (Italics ours.)

In the case of *Ex Parte Hudgings*, *supra*, at p. 383-4 (249 U. S.), Chief Justice WHITE says:

> "An obstruction to the performance of judicial duty resulting from an act done in the pres-

ence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted,—a principle which, applied to the subject in hand, exacts that *in order to punish perjury in the presence of the court, as a contempt, there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty.* * * * It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing." (Italics ours.)

In the face of the authority established by the principles above enunciated, the trial court erroneously held that mere shadowing, without contact with, or consciousness on the part of the jury, in and of itself constituted contempt. (R. 847, 854-5.)

Points V and VI

(1) The Trial Court Erred in Excluding Evidence Offered by the Respondents to Show That for a Number of Years It Had Been the Usage and Custom of

the United States Government, in Cases Being Prosecuted by the United States in the Various Circuits Throughout the United States, to Have the Agents of the Bureau of Investigation of the Department of Justice Actually to Shadow Jurors While They Were Serving as Jurors in Such Cases; and (2) That the Respondent Day Knew That It Was the Custom and Practice of the United States to Have Representatives of the Department of Justice Shadow Jurors Actually Serving in the Trial of Cases Prosecuted by the United States in the Federal Courts in New York.

We will consider Points V and VI together.

The respondent Sinclair, in his answer to the petition of the government, admitted that he authorized the employment of the Burns International Detective Agency "to keep the jurors under observation, for the purpose of ascertaining what persons if any came in contact with said jurors, to the end that he might know if any person who might be desirous of seeing him convicted of the charges against him should endeavor in any way to seek contact with any of said jurors," and asserted that he believed "he had the lawful right to employ the said William J. Burns International Detective Agency for the purpose aforesaid;" and that he gave instructions to the respondent Day "that the operatives so employed should receive strict and peremptory instructions that they should not come in contact with, approach or converse with any of said jurors and

should not in any wise molest, interfere with, impede or influence any of said jurors in the performance of their duties as such." (R. 14-15.)

Further answering said petition, the respondent Sinclair stated (R. 15): "Having in mind the matters and things herein set forth, and believing that in cases involving great public interest the government from time to time had kept jurors under surveillance during the time of such trials, and, entertaining such belief that the government of the United States had exercised such right and privilege, he believed that he, as a citizen of the United States, had the same right and privilege." (R. 15.)

On the trial, respondents called as a witness **A. Bruce Bielaski** (R. 787), who testified that he was employed in the Bureau of Investigation of the Department of Justice from the time of its organization early in 1909 until some time in February, 1919; that he was Chief of the Bureau of Investigation from April, 1912, to February, 1919; that the Attorney General was his immediate superior while he was Chief of the Bureau; and that he reported to the Attorney General concerning the activities of that department; that the Bureau headquarters were in the Department of Justice in Washington, and that he had numbers of men working under him; that in addition there were what were known as headquarters in various parts of the United States, located practically in all of the larger cities, and that at each of those places he had in charge either

an agent or a division superintendent. (R. 788.) The witness was then asked the following question:

> "During the time that you were the chief of the Bureau of Investigation of the Department of Justice, do you know as a fact that it was the custom and practice of the Department, upon request being made by special agents in the field, or by the United States District Attorneys in the several districts of the United States, to assign men to shadow jurors who were sitting in cases in which the United States was prosecuting individuals or corporations for alleged crimes and offenses against the United States?" (R. 788.)

The question was objected to by counsel for the government, whereupon the respondent made the following proffer:

> "We make the offer that if the witness were permitted to answer he would testify that he did know that such a custom and practice had existed, and we offer to prove that on the ground, first, that the usage, extending over this period of years, had ripened into a custom, and that that custom became the law, and that being so there could be no contempt of Court, under the facts in this case as related to the question of shadowing. Your Honor has already ruled on that. In addition to that, I offer it on this ground: That in a case where a man is charged with contempt of Court he has the right during the proceedings investigating the

matter of contempt, to offer any evidence which may tend to purge him of the contempt, either by minimizing the character of the contempt or mitigating any punishment that might be imposed by the Court. We offer it on both grounds, may it please the Court." (R. 788-789.)

The objection was sustained, and exception was duly noted. (R. 789.) Whereupon, the following question was asked the witness:

"I ask the witness this question, subject to your Honor's ruling, if it is not a fact that during the time that you were the Chief of the Bureau of Investigation of the Department of Justice, from the period of 1912 to 1919, as you have testified, that reports were made by men in charge of special agents, or by special agents, of activities of these special agents in shadowing jurors who were selected and sworn in criminal cases in which the United States was prosecuting its citizens for alleged violations of the law, and that such reports were brought to the attention of the Attorney General who was in office at the time when such reports were received in the Department of Justice?" (R. 789.)

The question was objected to by counsel for the government. The objection was sustained, and an exception was duly noted. Whereupon the following question was asked the witness:

> "Did or did not the several Attorneys General who were in office during the time that you were in office, in your incumbency of your office in the Bureau of Investigation in the Department of Justice, know of or approve of the custom of shadowing empaneled jurors by the United States representatives?" (R. 789.)

The question was objected to by counsel for the government; the objection was sustained, and an exception was duly noted. Proffer was made that the witness would say "They did," if permitted to answer. (R. 790.)

The witness **Mortimer J. Davis** was called on behalf of the respondents, and testified that he was employed in the Bureau of Investigation of the Department of Justice from January, 1918, to the middle of July, 1925, as a special agent. (R. 721.) The witness was then asked the following question:

> "Were you, as such investigator or special agent, employed in the shadowing of the petit jury in a case in which the United States was a party, during the actual trial of the case?" (R. 721.)

The question was objected to by counsel for the government; the objection was sustained, and an exception was duly noted. Whereupon, the following question was propounded to the witness:

> "Are you familiar with the custom of the Department of Justice with respect to shadowing

jurors while cases are actually on trial?" (R. 721.)

The question was objected to by counsel for the government; the objection was sustained, and an exception was duly noted. Whereupon, the following proffer was made:

> "I offer to prove by this witness, if your Honor please, that he is familiar with the practice of the Department of Justice, and the custom of the Department of Justice with respect to the shadowing of petit jurors in cases in which the United States is an interested party, while the case is actually on trial, and that that practice is—that he has known that practice since 1918, and that the practice is that in many cases, and for many years, it has been the custom of the Department of Justice and District Attorneys throughout the United States in the several jurisdictions to keep the jurors in cases on trial under surveillance, espionage, and shadowing whenever, in the opinion of the District Attorney, he thought it wise so to do, without any relation or respect to whether or not he had any reason to suspect the jury or any one of them." (R. 721-22.)

And thereupon the following proffer was made:

> "We also expect to show and make the proffer to prove by the witness that in the year of 1924, to be more specific, in the spring of 1924, in the case of U. S. v. John L. Phillips, and others,

tried in the Supreme Court of the District of Columbia, in the very room in which we are now sitting, at least eight men at all times, and sometimes more, being investigators of the Department of Justice, were employed and did keep that jury under complete, close surveillance, espionage, and shadowing at all times to such an extent that one of the investigators slept in the doorway of one of the jurors the whole night through. And that they took them up in the morning and put them to bed at night, and that this continued from the beginning of the trial until the end, a period of over two months. That the operatives were rotated from one juror to another by an intricate chart. That they not only shadowed the jurors, but they shadowed the lawyers and the witnesses as well. That some of the jurors became aware of the shadowing before the case was over, and that this fact was known to this witness. And that the United States officials to whom these men reported was then the present District Attorney, Major Peyton Gordon." (R. 722.)

William J. Burns, called as a witness for respondents, testified that he was appointed in the Secret Service of the Treasury Department about 1890; that he remained in that position until 1903, when he was transferred to the Interior Department, where he organized a group of special agents for the purpose of investigating the land frauds in California and Oregon; that he was there from 1903 until 1906. • • • That in August, 1921, he was ap-

pointed Director of the Bureau of Investigation of the Department of Justice, and resigned in the latter part of 1924. (R. 744.) The witness was then asked the following question:

> "Do you know whether or not there existed in the Department of Justice a custom, with respect to shadowing and observing of jurors in cases pending in the courts of the United States?" (R. 751.)

The question was objected to by counsel for the government; the objection sustained, and an exception duly noted. The witness was then asked the following questions (R. 751-2): "Do you know whether or not there was such a custom? How long has such a custom been maintained? Had or had not that custom been universal throughout the United States in the courts of the United States during that time? Is it not a fact, from your personal knowledge, that there existed in the Department of Justice a usage and custom to observe and shadow jurors in criminal cases, prosecuted by the United States, where there was no reason to suspect a lack of integrity on the part of the jury, and the jury were unsuspecting of the fact that they were being shadowed?" To all of which questions objections were made by counsel for the government, objections sustained, and exceptions duly noted.

Whereupon, counsel for the respondents made the proffer to prove that if the witness were permitted

to answer he would testify that he did know that such a custom existed; that it had existed for more than thirty years within his knowledge; that it had been the universal custom; that he knew that such a custom and usage existed in the beginning; and that it had covered more than a period of 25 years at least. (R. 751-752.)

The respondent **Henry Mason Day**, called as a witness, testified that on October 18, 1927, he knew that W. J. Burns had been for many years Chief of the Bureau of Investigation of the Department of Justice of the United States. Thereupon, he was asked the following question:

> "On that day did you know whether or not it was the custom of the United States District Attorney in the City of New York to shadow, through representatives of the Department of Justice, jurors engaged in the trial of criminal cases in the United States Courts in that city?" (R. 822.)

The question was objected to by counsel for the government; the objection sustained, and an exception duly noted. Proffer was made that the witness, if permitted to answer, would say that he did know of such a custom. (R. 822.) Whereupon, the following question was asked:

> "At that time was it or was it not a matter of public common knowledge in the City of New

> York that the custom of the United States District Attorney in the trial of criminal cases in the United States Courts in the City of New York to shadow juries after they were empanelled and sworn, and during the trial?" (R. 822.)

The question was objected to by counsel for the government; the objection sustained, and an exception duly noted. Proffer was made that the witness, if permitted to answer, would say that it was a matter of common and general knowledge. (R. 822.)

Whereupon, the witness was asked the following question:

> "Did you or did you not know of instances in New York, through public discussion, in which jurors had been followed, jurors empanelled in the United States Court there, by representatives of the Government and the Department of Justice, during the trial?" (R. 822.)

The question was objected to by counsel for the government; objection sustained, and an exception duly noted. Proffer was made that the witness, if permitted to answer, would testify that he did. (R. 822-23.)

In addition the respondents called as witnesses a number of former employes of the Bureau of Investigation of the Department of Justice, by whom the respondents offered to prove the custom, usage and

practice of the government in the shadowing of jurors during the time they were serving as such in the trial of cases in which the United States was interested. **John R. Kissel** testified that he was employed in the Bureau of Investigation of the Department of Justice from November, 1921, to December, 1925, as a special agent. (R. 712). By this witness the respondents offered to prove that he had shadowed jurors for the government in the trial of a case in Pittsburgh, Pa. (R. 713); also, in New York. (R. 715). **Felix Quigley** testified that he was employed in the Bureau of Investigation from March, 1922, to April, 1927. (R. 716). By this witness the respondents offered to prove that he had shadowed jurors for the government in New York City and Pittsburgh. (R. 717). **Daniel F. Dwyer** testified that he was employed in the Bureau of Investigation from March, 1922, to April, 1927. (R. 719). By this witness the respondents offered to prove that he had shadowed jurors for the government in New York and Pittsburgh. (R. 720). **Harry J. Jentzer** testified that he was employed in the Bureau of Investigation from 1906 to 1926. (R. 723). By this witness the respondents offered to prove that he had shadowed jurors for the government in the so-called Sugar Fraud Case in 1907; also in cases in Buffalo, N. Y., Cincinnati, Ohio, and New York City. (R. 725). **Dan E. Tatom** testified that he was employed in the Bureau of Investigation from the early part of 1918 until Novem-

ber, 1921. (R. 790). By this witness the respondents offered to prove that he had shadowed jurors for the government in New York City, (R. 791), and in Pittsburgh, (R. 792). **Walter C. Foster** testified that he was employed in the Bureau of Investiation from April 17, 1917, until May 6, 1926. (R. 793). By this witness the respondents offered to prove that he had shadowed jurors for the government in Philadelphia, (R. 795), and in the so-called Gray's Harbor Shipbuilding Case which was tried in Seattle, Wash., in 1920. (R. 795-796). **Edgar B. Speer** testified that he was employed in the Bureau of Investigation from the spring of 1917 until the spring of 1920. (R. 797). By this witness the respondents offered to prove that he had shadowed jurors for the government in the case of United States vs. Barrett, tried in the Western District of Pennsylvania in 1918 or 1919, (R. 798); and that he had also shadowed the grand jurors in that case. (R. 799.) **Bernard Kahn** testified that he was employed in the Bureau of Investigation from March, 1917, to November, 1924. (R. 799). By this witness the respondents offered to prove that he had shadowed jurors for the government in Columbus, Ohio, (R. 800); in Chicago, in several cases tried in that jurisdiction in 1923 and 1924, (R. 801-802); and in a case tried in Oklahoma City in February, 1923 (R. 802). **J. Gordon Shuey** testified that he was employed in the Bureau of Investigation from September, 1918, until January 1, 1925. (R. 805).

By this witness the respondents offered to prove that he had shadowed jurors for the government in a case tried in the District Court for the Western District of Pennsylvania. (R. 806).

In addition, the respondents called as witnesses **Albert G. Adams,** who was employed in the Bureau of Investigation from January, 1910, to March, 1919, (R. 802); **James W. Kemp,** who was employed in the Bureau from 1914 to 1917, (R. 803); and **Joseph F. Kroppy,** who was employed in the Bureau from July, 1914, until September, 1924, (R. 804). By all of these witnesses the respondents offered to prove that it had been the custom and practice of the government to have investigators of the Department of Justice shadow jurors who had been sworn and empaneled in the trial of cases in which the United States was interested, during the time they were serving as such jurors. But the court excluded the evidence so proffered.

It is undisputed in this case that there is no law forbidding the shadowing of a jury by either the government or the accused in the trial of a criminal case. The act of shadowing a jury, when considered in connection with a charge of contempt of court, must be considered and measured precisely the same as any other act or acts which might be claimed to have constituted a contempt, the test being:—did the act or acts obstruct the administration of justice or have a direct tendency to obstruct the adminis-

tration of justice. The most that the trial court could spell out of the act of shadowing was a conclusion that it had an indirect tendency in and of itself to obstruct the administration of justice. In considering whether it had such a tendency we think it was necessary to consider the usage and practice which had been established by the government of the United States with respect to the shadowing of juries in criminal cases. Surely, if for twenty-five years or more the government of the United States had pursued the practice of shadowing jurors sitting in criminal cases on trial in the various circuits of the United States, it must be assumed that the government had found from such practice that shadowing had no tendency to obstruct the administration of justice, as held by the trial court in this case; and since the holding of the trial court really rests upon the speculative conclusion that shadowing had an indirect tendency to obstruct the administration of justice, and not upon any act or acts establishing such obstruction or direct tendency to obstruct, evidence of the practice and usage of the government of the United States was relevant and material, and would be helpful in determining whether this conclusion was one which logically and legitimately could be drawn from the very act of shadowing itself. There being no fact establishing contact, and it being solely a question of the effect of the shadowing without contact, and the trial court having based its holding upon mere shadowing as such, the evi-

dence as to the practice and usage of the government itself for the past twenty-five years or more was important and relevant, because it must be assumed that the government during that long period did not find that shadowing in and of itself, without contact, tended directly to obstruct the administration of justice.

The trial court not only excluded all evidence offered by respondents to prove the custom, practice and usage of the Department of Justice with respect to the shadowing of juries in the various circuits of the United States sitting in criminal trials, but, after the court had adjudged the respondents guilty of contempt, when such evidence was offered on the question of mitigation, it was again rejected. (R. 855-856.)

Point VII.

The Trial Court Erred in Excluding Evidence Offered by the Respondents to show What the Witness O'Reilly Actually Said on the Occasion of His Visit to the Home and the Barber Shop of the Father of the Juror Kidwell.

The witness, **Frank J. O'Reilly,** called by the government, testified on cross-examination, as follows:

> "I was sent to Anacostia for the purpose of locating and seeing a Kidwell known as Barber Kidwell. I was not asked or directed by Ruddy

to locate or see or come in contact with Juror Kidwell. Ruddy told me that he thought that the barber, Kidwell, was a brother of Juror Kidwell. When I went to Anacostia I was upon the performance and execution of a particular mission that Ruddy had given to me. It was about 3 o'clock in the afternoon of the 24th day of October. I did not seek to locate or to find out anything whatsoever about Juror Kidwell when I went there. I had never been in Anacostia before. Upon my arrival in that section that I was told was Anacostia, I made inquiries as to a barber named Kidwell in that section of individuals on the street along Nichols Avenue, somewhere after I crossed this bridge going into Anacostia. I asked at least 5 or 6 people where Barber Kidwell lived. I was told by one individual that he believed there was a barber living on U Street named Kidwell, but he did not know what number. I referred to the list of Kidwells which I had compiled before leaving my hotel. I had in this list, as I remember, 3 or 4 who lived at number 1637 U Street which house I went to. At the time I went there to locate Barber Kidwell I did not then know the name, or the full name and initials of Juror Kidwell. When I went to this house, 1637 U Street, I rang the door bell. At no time did I go inside the house. I was not there more than 2 or 3 minutes. I stood on a small porch in front of the front door. When I rang the bell an elderly lady, resembling the lady I saw yesterday (Mrs. Mary Pearl Kidwell), came to the door." (R. 428-429.)

The witness O'Reilly was asked the following questions in connection with his visit to the house on U Street, and made the following answers:

> "Q. Mr. O'Reilly, when you went to the house on U Street, I believe you said it was 1637, and you met Mrs. Kidwell, will you state to the Court what inquiry, if any, you made of her and what remark or question you addressed to her?
>
> "A. In answer to my ring of the bell at this house, this woman answered the door. I asked her if there was a tenant in that house named Kidwell that was a barber.
>
> "Q. Named what?
>
> "A. Named Kidwell that was a barber." (R. 428.)

Whereupon, counsel for the government moved to strike out the questions and answers; the motion was granted, and an exception was duly noted. (R. 428.)

The witness O'Reilly was asked the further question:

> "Q. Did you ask her, for or anything about Juror Kidwell?
>
> "A. I did not." (R. 429.)

Whereupon, counsel for the government moved to strike out the answer; the motion was granted, and an exception was duly noted. (R. 429.)

Thereupon, the witness O'Reilly was asked the further question:

"Q. Now, do not answer this question until his Honor states that you can. Why did you go from 1637 U Street to the barber shop at the Myrtle Hotel?" (R. 429.)

This was objected to by counsel for the government; the objection was sustained, and an exception was duly noted. (R. 429.)

The witness, continuing, testified as follows:

"When I went to that house in Anacostia I did not know that Juror Kidwell lived there. I ascertained some time after I left Anacostia that this juror lived at 1637 U Street. I learned it when I returned to Wardman Park about 9:00 P. M. that night. I had no idea of it then. I did not know Juror Kidwell's initials. On the occasion of this trip to Anacostia I did not make any inquiry of anybody whatsoever between the time I went to Anacostia and the time I returned from Anacostia about Juror Kidwell. Concerning Barber Kidwell, I was directed to learn his place of business; to go there and look at him for the purpose of being able to give another operative a designation on this man at a later date, if so desired. I found Barber Kidwell in his barber shop at the Myrtle Hotel. I did not go inside of the shop. I was there one minute." (R. 430.)

Whereupon, the witness O'Reilly was asked the following question:

> "Q. Now, don't answer this question: Did you ask him any question concerning anyone?" (R. 430.)

This was objected to by counsel for the government; the objection was sustained, and an exception was duly noted. (R. 430.) Whereupon, the witness was asked the following question:

> "Q. Now, don't answer this question: Was Juror Kidwell's name called or mentioned in that conversation either by you or Barber Kidwell?" (R. 431.)

This was objected to by counsel for the government; the objection was sustained, and an exception was duly noted. (R. 431.)

The witness O'Reilly was asked the further question:

> "Q. Isn't it true that on the occasion that you saw Barber Kidwell, that not one word was said about or concerning in any way with reference to the juror?" (R. 431.)

This was objected to by counsel for the government; the objection was sustained, and an exception was duly noted. (R. 431.)

The government had called the witness O'Reilly and proved his visit to the home of Barber Kidwell (R. 428-29), followed by his visit to the shop of the said Kidwell (R. 430); and the record shows that

Juror Kidwell lived at the home of Barber Kidwell, his father (R. 507), and that the latter fact was not known to the witness O'Reilly at the time of his visit to the home of Barber Kidwell (R. 430). The effort of the government plainly was to show a visit by the witness O'Reilly, one of the Burns' operatives, to the home of the Juror Kidwell with a view of creating the impression upon the court that he had some evil purpose or that some sinister motive actuated the visit. These questions which were asked, to which objections were made and sustained, were designed and intended to show, and the answers would have shown, that the witness O'Reilly did not know that Juror Kidwell lived at the home of Barber Kidwell, had no intention of establishing contact with Juror Kidwell, of speaking with him or approaching him, and that he had no intention of making any inquiry concerning Juror Kidwell, either at his home or at the barber shop of Barber Kidwell. Surely, the respondents were entitled to show the facts which would relieve respondents of the suspicion or imputation sought to be put upon them by the government by a half-truth.

Point VIII.

The Trial Court Erred in Receiving, Over the Objections of the Respondents, Evidence by the Witness Kidwell, Jr., of Conversations With an Uniden-

tified Man in the Museum Grounds and at the Door of the Courthouse.

In the course of the trial, **Edward J. Kidwell, Jr.**, was called as a witness on behalf of the United States. (R. 480.) He testified, "I recall an incident while I was a juror when I was sitting on a bench in the Museum Grounds a man came up and went behind a tree and sat on the ground for a while. He was sitting right under the tree about 10 or 15 feet from the bench, • • •." (R. 482.) The respondents objected to the testimony concerning this incident on the ground that unless it be shown that the man who sat beside the witness was an agent of the Burns Detective Agency it would be immaterial as to what was done by any one else. The objection was overruled by the court and an exception was noted. (R. 483.) Subject to the objection of the respondents, the witness in undertaking to describe the man testified, "To the best of my memory he was a man about my height with dark hair and rather dark clothes. I did not pay particular attention to him at the time. He wore a hat." (R. 484.) Concerning this incident, subject to the objection of respondents, the witness further testified:

> "The man walked down the path from the 9th Street entrance until he got, I would say, within 25 feet of the bench on which I was sitting, then turned from the bench and went and sat under a tree directly in back of this bench; be-

fore he went back to the tree he stopped there, he just looked at me on the bench; there was no one else in sight that I could see any closer than B Street at the Market. He went directly from the path to the bench in back of me, the bench was 10 or 15 feet from the tree, I had a lunch prepared by my mother which I ate, and after that I was smoking a pipe; the man got out from under the tree and came over and sat on the bench beside me." (R. 484.)

The respondents further objected on the ground that there had been no identification of the man as to whose actions the witness had testified, and that the evidence should not be received until its relevancy first appeared. The objection was overruled by the court, and an exception noted. (R. 485.)

Continuing, the witness testified:

"The man came directly from under the tree and sat beside me on the bench and asked me did I have a cigarette, and I told him no I didn't have a cigarette. He asked me did I have the makings. So I told him I had tobacco, and I handed him a pouch of tobacco. He asked me what kind of tobacco I smoked. I told him it was Prince Albert. And he rolled a cigarette from the tobacco which I gave him, and handed me the pouch back and thanked me for it. He then said 'It is nice weather we are having for this time of year.' I told him that it was and he never said any more to me nor I never said any more to him. I stayed there for about ten

minutes, and then I got up and left him sitting on the bench. I have told all that was said." (R. 486.)

The witness Kidwell further testified:

"I do not know the name of the man who approached me in the Museum Grounds on the occasion I have testified about." (R. 489.)

The respondents moved to strike out all of the testimony of the witness concerning this incident, which motion was denied by the court, and exception noted. (R. 486.)

The witness Kidwell further testified that during the time he was serving as a juror, when he was returning to the courthouse he was approached by some unidentified man who spoke to him at the west door of the courthouse. Concerning this incident, the witness testified:

"The instance to which I have referred about the man speaking to me near the west end of the Courthouse was as follows: I was coming back from lunch and was standing on the sidewalk when a man came up to me and said, 'How can I get in there to hear that damn thing'? He said, 'I have been waiting around all morning and have not been able to get in for some reason or other.' But I never made any reply to him at all. He then said, 'What are they doing in there?' Or something like that. I didn't answer him at all, and he said, 'What do you think of that case,' or 'that trial'—I am not sure

of his exact words, whether—

"Q. That is all right. Please explain. You heard what the Court said.

"he said 'case' or 'trial,' I didn't say anything at all. I just walked away from him and came back into this room (indicating the jury room). Jurors Heaton and Bailey were not in there when I came in, they came in later. There was no one in there when I came in." (R. 490-491.)

The respondents objected to this testimony and moved to strike it out on the ground that there was no evidence to show that the man who spoke to the juror was in any wise connected with the respondents or that the respondents were responsible for the actions of this unidentified man. The objection and motion to strike were overruled by the court, and exception noted. (R. 491-492.)

In the course of the testimony of the witness, Kidwell, government co sel endeavored to have the witness identify Barton P. Stewart, one of the operatives of the Burns Detective Agency, as the man who sat beside him on the bench in the Museum Grounds, but the witness testified that he did not recognize Stewart as being that man. (R. 490.) The witness further testified that he did not remember seeing either Ruddy, O'Reilly, Klein or Stewart, operatives of the Burns Detective Agency, at any time during the trial of the Fall-Sinclair Case; that he did not remember seeing any of these men around the courthouse grounds or in the courthouse while

he was a juror, and that he never saw any of the other operatives of the Burns Agency. (R. 487.)

He further testified that he had not seen since and did not know the man who spoke to him at the west door of the courthouse. (R. 487.)

We submit that before any of this evidence could properly have been received it was essential that the identity of the men in question should have been established. It is manifest from the evidence of the witness that he could not identify either of the men whose actions he was permitted to testify about. In the absence of evidence showing that these men were in some way connected with or acting for the respondents, any evidence as to what occurred either in the Museum Grounds or at the west door of the courthouse was utterly irrelevant and should have been excluded. It being obvious that the evidence was not admissible, we submit that it requires no argument to demonstrate that the court committed error in overruling the objections of respondents.

Point IX.

The Trial Court Erred in Receiving, Over the Objection of the Respondents, Evidence of the Witnesses Kidwell, Jr., and Heaton, as to Conversations Among the Jurors.

The witness, **Edward J. Kidwell, Jr.**, when testifying as a witness for the government, was asked:

"Do you recall an occasion when you were serving as a petit juror that there was a talk among the jurors on the subject of being watched or being shadowed? Do you remember such an incident?" This was objected to by respondents on the ground that it was immaterial and irrelevant. The court stated that he would permit the witness to answer categorically, and the witness answered, "Yes." (R. 498.) The witness testified that this occurred some time during the trial, about two weeks after the trial started; that it occurred in the first room on the east side of the corridor of the courthouse where the jurors assembled. (R. 498-9.) The respondents objected to this testimony and moved to strike out the answer "Yes" of the witness on the ground that it was utterly irrelevant and hearsay. The court denied the motion to strike and an exception was noted. (R. 499.)

Subject to the objection of the respondents, the witness testified that he did not know exactly who was present on that occasion, but there were about 6 or 8 jurors or probably more there, and he thinks that this occurred one morning when they sent the jury out of the room during an argument on a question of law; that the jurors Herzog, Holmes and Kern were there, and that they participated in that talk. (R. 499.) The witness did not testify as to any conversation between the jurors on that occasion, but merely answered that there was such a talk.

The witness, **Bernice K. Heaton,** over the objection of the respondents, testified, "I was present during the time that the trial was in progress, in the conference room of the jurors, when the subject of being watched or shadowed or followed was mentioned or discussed." (R. 512.)

We maintain that it was error for the court to admit this evidence over the objection of the respondents. It is manifest that this evidence was offered by the government for the purpose of trying to make it appear that the jurors were conscious of the fact that they were being shadowed. If any of the jurors believed that he was being shadowed the only way that this properly could be established would be to have the juror testify to the facts which gave rise to the belief. A conversation such as that indicated by the predicate of the question, whether there was talk among the jurors "on the subject of being watched or being shadowed," affords no evidence that the jurors were conscious of the fact that they were being shadowed. The mere fact that there had been a conversation between the jurors on the subject of shadowing does not in and of itself afford any evidence against the respondents. On the contrary, members of the jury were called as witnesses, and none of them testified that they were at any time conscious of the fact that they were being shadowed.

Bernice K. Heaton, called as a witness by the government, testified that she served as a juror, but she was not asked whether she was conscious of the fact

that she was being shadowed. (R. 511-512). **Mrs. Annetta L. Bailey,** called as a witness by the government, testified that on October 28, during the time she was serving as a juror, while she was in the Convention Hall Bowling Alley she was aware that certain men were looking at her. (R. 510-511). This was received over the objection of the respondents, notwithstanding the fact that the record showed that the shadowing of Mrs. Bailey ended on October 21 (R. 272, 549), and there was no evidence to show that the men who were looking at her on the occasion when she was at the bowling alley were in any wise connected with the respondents. **Gardner P. Grenfell,** called as a witness by the government, testified that he was one of the jurors, but he was not asked any questions as to whether he was conscious that he was being shadowed. (R. 557-558). **John Phillip Kern,** called as a witness by the government, testified that he was a juror in the case, but he was not asked whether he was conscious that he was being shadowed. (R. 556-557). **Conrad J. Herzog,** called as a witness by the government, testified that he was a juror in the case, and that he was not aware that he was being shadowed. (R. 560). **Edward J. Kidwell, Jr.,** called by the government, testified that he was a juror in the case, but his testimony (R. 480-506) does not show that he was conscious that he was being shadowed during the time he was serving as a juror. He testified:

"On occasions of going in and out of the courthouse I never saw any of the Burns Agents that I know of; if they were there I didn't know who they were; I never at any time during the jury trial saw men whom I now know are Burns Agents." (R. 488.)

William H. Goucher (Juror) testified:

"At no time during the 23rd day of October was I aware of being followed or shadowed by anyone whatever." (R. 771.)

In an earlier part of this brief we have argued that there was no evidence before the court to show that any of the operatives of the Burns Detective Agency ever approached, talked to or came in contact with any of the jurors. We maintain that in the absence of any evidence that the jurors were conscious of the fact that they were being followed by the operatives of the Burns Detective Agency it was error for the court to admit evidence of the fact that there was a conversation among the jurors as testified to by the witnesses Kidwell, Jr., and Heaton.

Point X.

The Trial Court Erred in Receiving, Over the Objection of Respondents, Evidence of the Witnesses Kidwell, Jr., and His Mother, Mary Pearl Kidwell, as to Conversations Between the Juror Kidwell and His

Mother and Father During the Time He Was Serving Upon the Jury.

The witness, **Edward J. Kidwell, Jr.,** testifying as a witness for the government, was asked the following question: "During the time that you were serving as a petit juror in the Fall-Sinclair criminal case, state whether or not you did report or talk to your mother and father about these various incidents that you have described here in court, the man approaching you at the west end of the courthouse; the museum grounds incident; and the fact of the man having been to the house, and to the barber shop?" (R. 500-501), to which question the respondents objected on the ground that it was irrelevant; the objection was overruled, and an exception noted. (R. 501.)

The witness answered "Yes, sir." Subject to the objection and exception of respondents, the witness further testified:

> "Q. Mr. Kidwell, could you say whether or not you mentioned the museum grounds incident; the incident at the west end of the courthouse, and such as that?
>
> "A. Yes, sir.
>
> "Q. Now, which of the incidents did you mention to your mother?
>
> "A. The museum incident and the incident at the west end of the court, I think." (R. 501.)

The witness was further interrogated as follows:

"Q. Was the incident at the Museum Grounds, and the incident at the west end of the courthouse—were they the only incidents that you mentioned to your mother?

"A. Those are the only ones I remember.

"Q. Now, I ask the same questions with regard to your father. What incidents did you mention to your father at the time you were serving as a juror?

"A. I don't think I mentioned anything to my father.

"Q. Now, I specifically ask you whether or not, without going into anything that was said by any of you, whether or not you and your mother talked on the subject of the man's having been at your home at the time that you were serving as a petit juror?

"A. Yes, sir.

"Q. And state whether or not on that same day when you discussed the subject with your mother, you later on discussed the same subject with your father?

"A. I did that night.

"Q. On that same night, state whether or not you discussed with your father the subject of the man's having been at your father's barber shop in Congress Heights.

"A. Yes, sir." (R. 502-503.)

To each of the foregoing questions the respondents objected, and the objections being overruled, exceptions were noted. (R. 502-503.)

The witness, **Mrs. Mary Pearl Kidwell,** called as a witness by the government, testified concerning the visit of O'Reilly, one of the Burns operatives, to her home at 1637 U Street. (R. 506-507.) Whereupon, she was interrogated as follows:

> "Q. Just answer this question yes or no. When you saw your son that time, did you tell your son what had occurred about the man coming to the house?
>
> "A. Yes, sir.
>
> "Q. Do not say what your son Eddie told you. When you told your son that, did your son make a reply to you on that subject?
>
> "A. Yes, sir.
>
> "Q. Now, on the same day or night or evening when your husband, Edward Kidwell, Sr., came home—just answer this yes or no also—did you tell your husband in the presence of your son, Eddie, about the fact of the man having come to the house?
>
> "A. Yes, sir.
>
> "Q. State whether or not on that occasion, in the presence of your son and husband, your husband said something about a man having come to the barber shop. Just answer yes or not.
>
> "A. Yes, sir. (R. 507-508.)

To each of these questions the respondents objected on the ground that they were irrelevant and immaterial; and, the objections being overruled, exceptions were noted. (R. 507-508.)

We submit that it was error for the court to admit this evidence. We are at a loss to understand upon what theory this evidence can be said to be relevant. It is obvious that the questions called for hearsay testimony. It was certainly not admissible upon any hypothesis that it was a part of the res gestae of the transactions which were being inquired into in the contempt proceeding. The persons among whom the conversations occurred were strangers to the record. The conversations related to the incident which occurred to the witness Kidwell, Jr., in the Museum Grounds, to the incident at the west door of the courthouse, and to the visit of O'Reilly to the home and barber shop of the father of Juror Kidwell. If the witness Kidwell had had such a conversation with some stranger instead of with his mother and father surely it could not be argued that such conversation would be evidence. The mere fact that the conversation occurred between Juror Kidwell and his mother and father certainly does not alter the rule of evidence. It seems to us that the error is so obvious that argument is unnecessary.

CONCLUSION

It is submitted that the judgment of the trial court is obviously erroneous and should be reversed because there is no evidence showing any act done by any of the respondents which obstructed the ad-

ministration of justice or which had a direct tendency to obstruct justice, and in the absence of such evidence the court was without power to adjudge the respondents guilty of contempt; that the judgment of the trial court should be reversed and remanded with directions to dismiss the petition and discharge the respondents.

Respectfully submitted,

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March 30, 1929.

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IN THE

Supreme Court of the United States

No. 748.

HARRY F. SINCLAIR, ET AL.,

vs.

UNITED STATES.

BRIEF FOR APPELLANT, HENRY MASON DAY.

DANIEL THEW WRIGHT,
PHILIP ERSHLER,
Attorneys for Henry Mason Day.

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IN THE

Supreme Court of the United States

No. 748.

HARRY F. SINCLAIR, ET AL.,

vs.

UNITED STATES.

BRIEF FOR APPELLANT, HENRY MASON DAY.

An appeal from an order of the Supreme Court of the District of Columbia adjudging the appellant guilty of contempt of Court and sentencing him to imprisonment in the common jail, is here on certification from the Court of Appeals of the District of Columbia.

STATEMENT OF FACTS.

H. F. Sinclair was President of the Sinclair Consolidated Oil Company and of a number of its subsidiaries; Mr. Day was his intimate associate and representative in the executive affairs of the Sinclair interests, answering much of his mail and attending to many matters of detail in a business of such magnitude

as rendered it impossible for all such to receive the personal attention of the President.

Mr. Day was in close daily contact with President Sinclair (R. 820) and the one through whom Mr. Sinclair's orders in matters of importance were executed. Mr. Sinclair was under indictment in the Supreme Court of the District of Columbia for conspiracy to defraud the United States, the trial being set to occur on October 17, 1927. The continual presence of Mr. Sinclair in Washington during the protracted period of the trial required the presence in Washington also, of a substantial part of his executive force including a number of secretaries in order that the commercial, domestic and foreign affairs of the numerous interests which were in his hands for discharge might continue to go forward; amongst these executives was Mr. Day; whose presence in Washington was especially necessary because of the unavailability of Mr. Sinclair for business purposes during the business hours of the day because of his presence in the Court room during the trial. (R. 823.)

The experiences of Mr. Sinclair during the recent past had made both him and Mr. Day fearful and apprehensive lest improper and lawless efforts might be made to corruptly influence one or more members of the trial jury to deny him a fair trial. Nor could any other man who had endured his experiences have apprehended or feared otherwise. Congress in its wisdom had created special prosecutors, removing his prosecution from the control of the public officers maintained by the law of the land for the performance of such duties and responsible to the people for their correct discharge; had obliterated by special legislation long established principles of criminal procedure

which the experience of humanity had evolved as essential to the safety of the citizens, amongst them denuding the Court of Appeals of the District of Columbia of an existing jurisdiction to determine his appeal then pending before it, in which appeal the sufficiency of the very indictment upon which he was about to be tried was the question. Other proposed legislation directed specifically against him was being agitated and was pending; his daily mail was being consistently opened before delivery, he was continually shadowed upon the streets, about his residence, clubs and places of business, by men whom he did not know; government agents had made numerous examinations of his books, records, documents, bank accounts, interrogated his employees and pried into his private and business life; a portion of the public press was publishing in advance of the trial perverted news articles to bias the public mind and prejudice the local public against him. The day of trial arrived, the jury were qualified and having been sworn were permitted to separate and go at large.

On that day, upon returning to his hotel from the Court room, Mr. Sinclair expressed to his confidential friend and associate, Mr. Day, his disappointment that the jury had been permitted to go at large, as well as his trepidation and apprehension lest some of his enemies, competitors or those who had assailed him with malicious and malignant letters, might endeavor in some way to corruptly influence the jury against him.

William J. Burns, an investigator of international fame and scintillating reputation, with an office in New York, had until quite recently been chief of the Bureau of Investigation of the Department of Justice of the United States; it was a matter of public and general

knowledge that for many years, prior to and during Burns' incumbency, the Government of the United States had through its Department of Justice Bureau of Investigation "shadowed" (as it is termed) through its operatives, individual members of and entire panels of petit juries engaged in criminal trials during the adjournments of the Court throughout the trial. It was a matter of common knowledge in the city of New York (the city of Mr. Day's residence and Burns' office) and was personally known to Mr. Day, that the common practice and custom of the United States was to "shadow" the jury panel as well as individual members of trial juries sitting in the United States Court in the City of New York in criminal trials. Mr. Jeffries was Mr. Sinclair's personal Secretary in charge of Mr. Sinclair's office in New York during his absence from that city (R. 823). Mr. Sinclair having expressed to Mr. Day at the Mayflower Hotel upon his return from Court the first day of the trial, his perturbation and apprehension over the fact that the jury had not been locked up, directed Mr. Day (R. 823) to tell one of the secretaries who was in Washington to call Mr. Jeffries in New York and ask him to have one of the Burns communicate with Mr. Day in Washington, stating to Mr. Day that he wanted operatives with a lieutenant and a captain sent to Washington for the purpose of observing the members of the trial jury during the adjournment of Court to ascertain whether efforts to corrupt any of them were being made; his instructions were specific that no juror should be approached, nor spoken to, nor should any of the operatives in any way come in contact with any juror. They were to do no more than observe, and to report any suspicious conduct of jurors with third parties. Mr.

Day told one of the secretaries to call Jeffries and have him ask one of the Burns' to call him (Day) by 'phone at an address and telephone number in Washington which Mr. Day designated. Mr. Burns subsequently called Day, who requested him to send to Washington ten or twelve of his most responsible men with a lieutenant and a captain i ncharge, "to see, if it were humanly possible, that Mr. Sinclair received a square deal in the case." He said that he wanted the members of the jury shadowed, but under no circumstances was anyone to come in contact with any juror (R. 824). After talking with Mr. Day, Mr. Burns called his New York manager, Mr. Scanlon, into conference (R. 776), talked over with him the selection of the personnel to be used, told him that it was a surveillance or shadow job, that he wanted shadow men; that whatever men he (Burns) saw personally he would instruct not to come in contact with any of the jurors, that if a juror became aware that he was being shadowed and approached any of the men, for the man to walk away and drop the juror; Mr. Burns further told Scanlon that if he (Burns) did not see all of the men, that Scanlon should give them those instructions himself. Burns then considered whom he would put in charge and selected Mr. Ruddy, Manager of the Philadelphia office, because of his ability and good judgment. Burns by 'phone told Ruddy the nature of the employment, directed him to go to Washington, to communicate with Mr. Day, and that after he had talked to Day, to report back to him (Burns) in order to be sure that he (Burns) was correct in his assumption as to what the work was to be and its limitations. He directed Ruddy to call him on the long distance telephone after he had talked with Day. His purpose was (R. 777) to check what Ruddy

got from Day and determine whether or not the business was within the scope of legality and propriety.

Ruddy called upon Mr. Day in Washington, and having identified himself as from Burns' Agency, was handed by Mr. Day a list of the jurors which list had been prepared by counsel to assist them in the examination of jurors upon the voir dire. (R. 79, 826, 838, 840.)

Day told Ruddy to place the jurors under surveillance, that under no circumstances was any juror to be apprehended, but he wanted to be informed whether the operatives found that the jurors were approached by any one else, and to take the numbers of any automobiles that the jurors might get into with anybody; "he emphasized that the men were to be careful and instructed that they were not to approach the jurors at any time or in any way." (R. 83.)

After talking with Day, Ruddy reported the conversation to Mr. Burns by telephone as he had been instructed to do, confirming the correctness of Burns' interpretation of the employment, and its limitations. Burns told him to see that the men were very careful, and instructed that they were not to approach or communicate with any juror, or permit any juror to know he was being observed, and if any man disobeyed his instructions, he was to be immediately sent home; that he (Burns) had already so instructed the men sent from New York. (R. 84.)

Ruddy so instructed each of the operatives upon their arrival in Washington, and told them further, that they should not speak to any of the jurors, and that if they did they would be dismissed from the service of the agency. (R. 379.)

Ruddy designated to the operatives which of the

jurors they were to observe, directed them to report daily to him in writing, and this was done; Ruddy edited the reports, and from time to time himself reported to Mr. Day, who in turn advised Sinclair of some few matters which seemed important. (R. 85, 399, 827.)

Ruddy first talked with Day upon October 18, the first operatives arrived in Washington on October 19, the first active surveillance of jurors was upon October 20th.

The entire panel was never under observation, for lack of operatives. In all, fifteen Burns' men, including Ruddy and his amanuenses, came to Washington and were at work for three days, until Monday, October 24th. By this time the unfeasibility of the undertaking, as well as the large attendant expense had become apparent, and on that day, all but five operatives and Ruddy were discontinued and sent home. (R. 86.)

On Oct. 24, Day directed Ruddy to let the operatives go immediately, and keep only two or three, to work on certain suspicious episodes involving three of the jurors, and these continued the surveillance of certain jurors and other persons to and including October 30th. The government counsel and prosecutor knew the existence of and the details of the surveillance on October 24, knew that it was being continued and suffered the trial to proceed without making any report of it to the Court.

On October 29th, a newspaper reporter for the Washington Herald, named Donald King, deliberately sought out one of the jurors, Kidwell, in a "near-beer" saloon "for the purpose of getting a story for his paper," (R. 611), engaged him in conversation about the case on trial, plying him with drinks in order to

unloose his tongue about the trial: "I was giving him drinks so that he would talk, and would have time to talk" (R. 607), and this, after the editor of the newspaper and a local attorney had told King that it would be "all right for me to go and talk to this juror" (R. 599). King wrote up his conversation with the juror and it was published in his paper.

King was called before, and testified to the Grand Jury on October 31st, an affidavit was prepared by Assistant District Attorneys, sworn to by King on that day, and presented to the Court by government counsel on November 2, 1927, resulting in the discharge of the jury from further consideration of the case. Inexplicable as it may seem, yet no effort has ever been made to cite either the newspaper reporter King, the juror Kidwell, the editor or the lawyer for this conduct. But on November 22nd following, the District Attorney for the District of Columbia filed a petition against Sinclair, Burns and his son, W. Sherman, Day, Clark and Veitsch, charging them with contempt of Court in the mere observation of members of the jury for purposes entirely pure. In the interim, the Messrs. Burns and all of the operatives including Ruddy had been called before the Grand Jury and testified, voluntarily brought from New York and presented their records to the District Attorney, and unhesitatingly revealed the entire and complete truth of the affair to its utmost ramifications. The petition does not state that any operative approached or communicated with or attempted to approach or communicate with any juror; it does not state that any juror was conscious, or even suspected, that he was being observed; it does not aver that "the Administration of Justice was obstructed." The respondents all voluntarily appeared,

filed motions to dismiss the petition which were overruled, and answered admitting in detail the employment of the Burns' Agency for the purpose of observing jurors, admitting that the operatives did observe jurors, did report to Ruddy, that the reports were received from Ruddy by Mr. Day and that he in turn had made reports to Mr. Sinclair; the answers averred that the purpose which had actuated them was the legitimate and proper purpose of preventing the intrusion of unlawful and corrupt influences upon the jury, and denied that the purpose was to bribe, influence or interfere with jurors as averred in the petition.

The hearing of evidence began December 5, 1927, terminated February 21, 1928; the evidence developed nothing tending to support the petition which was not openly admitted in the answers of the several respondents. Sixteen witnesses testified that the operatives had been instructed not to approach, communicate with, or permit any juror to know that he was being observed and there was no evidence to the contrary; there was no evidence tending to show that any juror had been approached or communicated with by any operative, none that any operative had attempted or sought to approach or communicate with any juror, and none that any juror had known that he was being observed by any of the operatives. Neither was there any evidence which tended to show that the purpose of any of the respondents was other than that stated in their answers, to prevent if they could, the corruption of the trial jury. In spite of the absence of all such evidence, Messrs. Sinclair, Day and W. J. Burns were found guilty of contempt of Court and sentenced to imprisonment in the common jail; Sherman Burns

was found guilty and sentenced to pay a fine. The District Attorney claiming and the Court decided, that the mere observing of jurors, with good and lawful motives, with no purpose of making contact with any of them, with no contact made or attempted, and with no knowledge upon the part of any juror that he was being observed, constituted a contempt of Court.

POINTS.

The assignments of error as classified are directed against:

1. The overruling of the motion to dismiss the petition, and to dismiss at the conclusion of the Government's evidence.
2. The admission and exclusion of evidence.
3. Refusal to hear evidence in mitigation of sentence.
4. The judgment of conviction.

Error in overruling the motion to dismiss is assignment No. 1. Error in overruling the motion to dismiss after the evidence was in, is assignment No. 10. Error in the judgment of conviction is assignment No. 23.

While these three assignments present the same basic question, and upon this basic question can be discussed together, yet assignment No. 1, "Error in overruling the motion to dismiss the petition," presents an additional question which is exhibited as follows.

No matter what the evidence in a case is, it cannot enlarge the charge made in the accusation; the evidence admitted against an accused in a criminal trial may prove him guilty of larceny; yet he may not in that trial be adjudged guilty of larceny upon an accusation which does not charge him with it. The point

of the motion to dismiss the petition, is that the petition did not charge contempt of Court, in that it failed to set forth facts which showed that Day or anyone else had "obstructed the administration of justice;" it failed to so aver generally, failed to aver that any one ever approached or communicated with any juror; failed to aver that any one attempted to approach or attempted to communicate with any juror; failed to aver that any juror was conscious of being observed, so that it made no pretense of showing that the administration of justice had been obstructed.

The point of the botion to dismiss made at the conclusion of the government's case (R. 698) and renewed at the close of all evidence (R. 842) was the same; there was no evidence tending to prove that any operative approached or communicated with any juror; no evidence that any operative endeavored or attempted to approach or communicate with any juror; no evidence that any juror was conscious of being observed. It was, and is, claimed as the law of both logic, and of the land; that so long as Court and jury proceed toward the ascertainment and administration of justice, unaffected by, and unconscious of any extraneous influence, that such influences are non-existent as to them, have no effect, and the administration of justice has not been obstructed. Crimes may or may not be committed, round about them and on all sides; but so long as Court and jury are unaffected by, and unconscious of, them, they can exercise no influence upon Court or jury; so long as no influence has been exercised upon Court or jury, neither court nor jury, nor the administration of justice has been affected, and the administration of justice has not been obstructed.

The power by process of "Contempt" to remove obstruction from the path of justice, or to punish for the intrusion into that path of an obstacle which does ob-

struct, it well said to be necessary to the efficacy of Courts. Beyond this, there exists no need nor reason for the existence or exercise of such a tremendous and summary power. The functions of judicial tribunals neither need nor call for it; it is not required; there is no purpose which it can fulfill.

If the act of a citizen seems flagrant because it is a crime, then as a crime it must be punished, after indictment and jury trial; unless, of course, it has obstructed the administration of justice, as well as violated the penal laws. Let it be howsoever criminal you will; yet if it has not obstructed the administration of justice, it is not contempt of a judicial tribunal; and for one who happens to be a judge by his mere *ipse dixit* and only because, perchance, his sensibilities may be agitated, to deprive citizens of property, liberty and fame, is destructive of the institution of a free land, insufferable to its people, and can be neither justified, tolerated nor sustained.

Startling as it may seem, the District Attorney manifested no conception of the foregoing distinction; his position below was that a violation of Section 135 of the Penal Code was a contempt of Court; he said (R. 77):

> "Now, Section 135 of the Federal Penal Code provides, and so far as the petition filed by the United States is concerned, I shall read the provisions of that section in full, and then I will delete it to show the portions that I claim are violated or constitute a contempt of this Court such as is charged in the petition:
>
> . . . . . .

> "The petition sought to bring to the Court's attention the acts of these respondents as a contempt of Court, for doing acts that the Government considered was *a violation of the language of that section*, and hence a contempt of court."

It is not startling, that the District Attorney grounds his case upon a penal statute, and claims that for the violation of such a statute a citizen should be held in contempt of court?

For cases of felony, the Constitution provides that no person shall be held to answer for a capital or infamous crime unless upon presentment or indictment by a grand jury. If a misdemeanor, the same instruments warns that no person shall be deprived of life, liberty or property without due process of law. The Supreme Court has many times announced that due process of law requires a jury trial. The petition at Bar was conceived in the belief that to violate a penal statute as such, was contempt of Court. This proceeding has been carried on in that belief, which is enough to destroy it.

In the case of Coll, 8th Fed. (2nd) 20, was a similar enterprise; it was charged by the District Attorney that Dr. Coll was guilty of contempt of court in that he had undertaken to bribe a witness, elsewhere than near about the court house.

No bribe was given and the witness never testified falsely. He had been promised immunity on account of his testimony before the grand jury, but there had been no actual obstruction of justice by "persuading" or "securing" him to testify falsely.

The Circuit Court of Appeals said:

"The power of the Federal District Court to punish for contempt is limited by Act of March 2, 1831."

(Reading the first section of the Act.)

"Section 2 of the Act of 1831 is now Section 135 of the Penal Code, and is as follows.

(Reading the second section of the Act, upon which the District Attorney has grounded this proceeding.)

Then, says the Court:

"It is elementary that the legislative purpose must be inferred from the entire act. The two sections are to be read together. Section 2 covers misbehavior in obstructing the administration of justice not punishable as a contempt under Section 1. The United States Attorney for Porto Rico concedes that the alleged offenses of Dr. Coll might have grounded indictments and prosecution under Section 2; but his extraordinary contention is that it was necessary to proceed in such fashion as to deprive the alleged wrongdoer of a jury trial."

"In his brief it is stated:

'We are impelled to close this paragraph by saying that the public character, notoriety, and influence of those charged with contempt in this case was of such a nature that a reasonable man, knowing the situation as it then existed, would have great and serious doubt whether a jury could be found within the jurisdiction of the court below that would convict the defendants below, even for the grossest contempt.'

"This amounts to urging usurpation of jurisdiction, in order to achieve a conviction thought impossible under the forms of law provided by Congress."

The court then proceeds at very considerable length and closes thus:

> "We may observe, generally, that it is now settled by decisions of the highest court in the land, that the broad, almost unlimited, power to punish summarily for contempt, asserted by many courts, may constitutionally be, and has been, limited by legislative enactment. It is now beyond question that the Act of 1831 and Sections 21, 22, of the Clayton Act of October 15, 1914, are, in the federal courts, valid restrictions on powers which many courts have asserted as inherent in all real courts.
>
> Another recent and significant decision, showing the critical care with which the Supreme Court of the United States is now guarding this vitally necessary, but highly dangerous, power to punish for contempt, is Cooke v. the United States, 267 U. S., 517, decided April 13, 1925. All the implications of this latest decision of the Supreme Court concerning criminal contempt make for the construction that we give to the statute of 1831."

That construction was just as is claimed here, that there must have been an obstruction to the administration of justice, otherwise the attempt, if any, must be prosecuted by indictment and a trial by jury accorded.

The foregoing portrayal of the cause and its conduct below is sufficient background for the

ARGUMENT.

The "inherent power" of Federal Courts to punish for "contempt" has been purposely, definitely and distinctly limited by Act of Congress. The history and cause of that legislation is interesting and illuminating.

When the original Judiciary Act of 1789 was adopted the phrascology of the statute upon the subject of contempts was thus—(Section 17 of the Judiciary Act of 1789):

> "That the judges of the said courts of the United States shall have power to administer all necessary oaths and affirmations, and to punish by fine and imprisonment, at the discretion of said courts, all contempts of authority in any case on hearing before the same."

Such was the statute. And such it continued to be up until 1830, when Judge Peck, the District Judge of the District of Missouri, was impeached. The facts upon which the impeachment was grounded were;—Mr. Lawless, a member of the St. Louis bar, was engaged as counsel in the trial of an important land cause before Judge Peck. The judge announced his decision orally from the bench. It was adverse to Mr. Lawless. A day or two later there appeared in a newspaper what purported to be a written opinion of the judge, and indeed it turned out to be such. He had, at request, formulated his opinion into writing after delivering it orally from the bench, of which Mr. Lawless was ignorant. Lawless wrote and there was published in the same paper an article signed "Citizen," which undertook to point out what were claimed to be various errors in the published opinion of the court, and to criticise them as such. Upon the convening of court, the judge upon the bench read from the newspaper and inquired of the Bar who were assembled if any knew the name of the editor. Mr. Lawless responded that he did, and gave the name. Thereupon, the editor was cited for contempt of court, and was defended as best

he could by Mr. Lawless, who counselled the editor not to divulge the name of the author of the article because he, Mr. Lawless, desired to stand upon the legal question of the right of a citizen to criticise, if he saw fit, the opinion of a court after the trial was ended.

It becoming manifest that the judge was about to commit the editor for contempt of court, Mr. Lawless then advised him to disclose himself, Mr. Lawless, as the author of the article, which the editor did. The name of Mr. Lawless was forthwith substituted for that of the editor, and he was sentenced to 24 hours in jail and to be suspended from the practice of law for 18 months. He was sent to jail and released upon a writ of habeas corpus. But the limitation of time upon his activities at the bar was carried into execution against him.

Judge Peck was impeached and tried before the Senate of the United States. Mr. McDuffie, Mr. Buchanan and Judge Spencer of New York were active upon the part of the Managers. They having the statute in mind, contended, as we contend at Bar, that there was no power in the court to punish for contempt unless the act complained of, "obstructed the administration of justice." Mr. Meredith for the defense contended that the judge had power by the processes of contempt to protect himself against libelous criticism. Mr. Wirt, for the defense, was shrewder than that. He made the same contention, but went further. He said:

> "Be it even so that the judge had no power to punish this for contempt, yet he believed he had the power, and an impeachment for error in judgment is not consistent with the theory or the practice of English government. God forbid that a magistrate should suffer from an error of judg-

ment if his purpose was honestly to discharge his trust." (Trial of Judge Peck.)

The trial began in the Senate on the 20th of December, 1830. On the 31st day of January, 1831, it ended, and the vote of the Senate was taken, 21 for guilty and 22 for not guilty. Thirty days later the Act of March 2nd, 1831, was passed as exhibiting the determination of Congress to be that no judge without a jury trial should deprive a citizen of life, liberty or property unless for "obstructing the administration of justice."

The Act of 1789 used the word "judges;" that "judges" of the courts of the United States shall have power to administer all necessary oaths, etc. The Act of 1831 eliminated that word "judges", because in the debate before the Senate it was that word upon which Mr. Meredith relied to convince the Senate that the power of the court extended to the vindication of an individual judge from personal or official criticism. And that word "judges" was wiped out of the statute by the Act of 1831, which provided: "That the power of the several courts of the United States"—not judges—"to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any case except the misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice."

Ex Parte Robinson case, 86th U. S. 510, was perhaps the first case in which the subject of the limitation of power by the Act of 1831 was directly dealt with by the Supreme Court. It announced:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2nd, 1831. The act, in terms, applies to all courts, whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."

"The act of 1831 is, therefore, to them, the law specifying the cases in which summary punishments for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1. Where there has been misbehaviour of a person in the presence of the court, or so near thereto as to obstruct the administration of justice; 2. Where there has been misbehavior of any officer of the courts in his official transactions; and, 3. Where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts."

The Act of 1831 contained two parts: Section number one, and section number 2. They are as follows: 4th Session laws, page 487.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the power of the several courts of the United States to issue attachments and to inflict summary punishments for contempt of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Sec. 2. *And be it further enacted*, That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any Court of the United States, in the discharge of his duty; or shall, corruptly, or by threats or favor, obstruct, impede, or endeavor to obstruct or impede, the due administration of justice therein, any person or persons so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense.

Approved March 2, 1831."

4 Stat. 487-488.

Section 1 of the original act is now sec. 385 Judicial Code; Section 2 of the original act, is sec. 135 of the Criminal Code.

The second section of the Act is very significant as indicating the legislative intent as to what the appropriate construction for the first section of the Act, should be; the second section makes it a criminal of-

fense to do, as manifestly Congress thought, that which was not contemplated by the first section of the Act as constituted contempt of court, because the first section provides, "Shall not extend to any case except the misbehavior of any person or persons in the presence of said courts, or so near thereto *as to obstruct* the administration of justice.

That either means what it said, or it means something else. If it means what it says, Congress intended that deportment or misbehavior outside of the presence of the Court must obstruct the administration of justice before it could be proceeded against as contempt. And Congress proceeded to emphasize that view by the enactment of the second section of the Act, which is as follows:

> "And be it further enacted, that if any person or persons shall, corruptly, or by threats or force, *endeavor* to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty or shall, corruptly, or by threats or force, obstruct, or impede, or *endeavor* to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment," and so forth.

If the Act be examined in the raiment which it wore when adopted by the Congress of the United States, it is not manifest that, actuated as it shows Congress was, by complaint already arising among the people as to the usurpation of power by the Federal Judiciary, that this Act was intended to limit the power to punish for contempt, and, therefore, to limit the actual commission of contempt to the doing of things which "obstructed" the administration of justice? The Act said,

"obstruct the administration of justice"; and that if conduct came short of "obstructing of justice", it might be punished as a crime; if it were an attempt which did not succeed, which did not reach the mark, it was a thing which should be punishable by criminal procedure, in which the defendant had the right to trial by jury; so that no charge should or could be made against the Federal Judiciary of attempting to usurp power which, under the Federal Constitution, was vested in a jury of the people.

"Where there has been misbehavior of a person in the presence of the Courts, or so near thereto as to obstruct the administration of justice."

What does that mean? Does it mean that if there be misbehavior in the presence of the Court it may be dealt with as for contempt, although it does *not* obstruct the administration of justice? That only misbehavior *beyond* the presence of the Court need obstruct justice to amount to contempt? It may mean that, or it may mean that misbehavior of a person or persons in the presence of the Court, as well as out of the presence of the Court, must obstruct the administration of justice in order to amount to contempt. This question the Supreme Court has settled in the Hudgins case (249 U. S., 378) by there deciding that the "misbehavior" of committing perjury in the presence of the Court was not contempt, unless it "obstructed the administration of Justice."

The Savin case (131 U. S. 267), was one wherein an effort was made by the respondent in the jury room, seven feet from the court room, and in the hallway upon which the door opened, to bribe a witness to testify falsely in the pending trial. He was adjudged guilty of contempt, and the matter came to the

Supreme Court of the United States on habeas corpus. This case exhibits, as many others do, the thoughtful care of the Supreme Court; its foresight in undertaking to go no farther than the exigencies of the case require in the interpretation of legislation, leaving open, for future determination by the court, according to the illumination of its surrounding circumstances, the questions which can arise, but have not yet come to the bar.

Justice Harlan said (131 U. S. 267):

> "The power of the courts of the United States to punish contempts of their authority is not merely incidental to their general power to exercise judicial functions, but, as was said ex parte Terry, 128 U. S. 289, 304, where this subject was considered, is expressly recognized and the cases in which it may be exercised are defined, by Acts of Congress. The Judiciary Act of September 24, 1789, invests them with 'power to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same'.
>
> "By an Act of Congress, of March 2, 1831, Declaratory of the Law Concerning Contempts of Court," it was enacted:—

and the statutes are then quoted by the Justice; after which he proceeds:—

> "The second section of the Act of 1831 is in part reproduced in section 5399 of the Revised Statutes, title 'CRIMES.' That sections is as follows:"

He read the second section of the Act, and continued:—

"It is contended that the substance of the charge against the appellant here, that he endeavored, by forbidden means, to influence or 'impede' a witness in the District Court from testifying in a cause pending therein, and to obstruct or impede the due administration of justice, which offense is embraced by Section 5399, and, it is argued, is punishable only by indictment. Undoubtedly, the offense charged is embraced by that Section, and is punishable by indictment. But the statute does not make that mode exclusive, if the offense be committed under such circumstances as to bring it within the power of the Court under Section 725."

"The Act of 1789 did not define what were contempts of the authority of the Courts of the United States, in any case or hearing before them, nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation. The Act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified cases, among which was misbehavior in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice."

"The question then arises, whether the facts recited in the final order of the District Court as constituting the contempt—which facts must be taken in this collateral proceeding to be true—'make a case of misbehavior in the presence of the Court, or the misbehavior so near thereto as to obstruct the administration of justice therein.' There may be misbehavior in the presence of a court amounting to contempt, that would not, ordinarily, be said to obstruct the administration of

justice. So there may be misbehavior, not in the immediate presence of the Court, but outside of and in the vicinity of the building in which the court is held, which, on account of its disorderly character, would actually interrupt the court, being in session, in the conduct of its business, and consequently obstruct the administration of justice."

Follows a discussion, wherein the Court dealt with the argument that had been made, that the difference between the Savin case, the case under consideration, and the Terry case—The Terry case was where a man assaulted the marshall in the court room in the presence of the judge,—that the difference between the Savin case and the Terry case was that in Terry's case the act was committed in the presence of the judge, and that, in the Savin case, the act was not committed in the Court's presence. Justice Harlan continued:

"We are of opinion that the conduct of the appellant, as described in the final order of the District Court, was misbehavior in its presence, for which he was subject to be punished without indictment, by fine or imprisonment, at its discretion, as provided in Section 725 of the Revised Statutes."

He had already said, speaking to that point:

"But if such attempt and offer occurred in the hallway just outside of the court room, or in the witness room, where Flores was waiting, in obedience to the subpoena served upon him, or pursuant to the order of the court, to be called into the court room as a witness, must it be said that such

misbehavior was not in the presence of the Court? Clearly not."

The point of the Savin case was to show the recognition by the Supreme Court of the limitation of power which the statute put upon Federal courts; and, also, to establish that the environs of the court, the places and rooms used by the court in the transaction of its business, were in the court's presence. Whether the conduct complained of "obstructed justice," was taken for granted; was not debated; it was conceded.

In the Cornish case, in 299 Federal, page 293, a decision by the Circuit Court of Appeals, the syllabus is:

> "Under Judicial Code, Section 268, (comp. st., 1245), contempt not committed in the physical presence of court, or constituting disobedience to an order, must have been so near to the presence of the court as to have obstructed the administration of justice."

The opinion is very short. The Court said:

> "Where there is a prosecution as for contempt, Under Section 268, Judicial Code, and where it is not claimed that the alleged misbehavior was committed in the physical presence of the Court, or constituted disobedience shall have been 'so near thereto as to obstruct the administration of justice.' When the conduct complained of is a newspaper publication, defamatory of the trial judge, it is also necessary that the publication relate to a matter pending, and not to one that is past."

And why? It is in that field of proceedings against newspapers for contempt that most of the judicial ex-

pression upon this particular subject has been had, and in which cases it is universally ruled that unless the case, concerning which the publication speaks, is still pending, still going forward, so that the article may affect the future action of the court or jury, there is no obstruction of justice and no contempt. The opinion recites:

> "The publication here involved is not obviously and certainly within the forbidden field in either of these particulars. We do not say that it may not be within that field in both particulars; but in such a situation the pleading, whether petition or information or journal entry, by which the prosecution is initiated, should state completely the necessary facts, and not stop with conclusions. Under this test, we think the petition herein insufficient. It does not state the facts from which it draws the inference that the publication would obstruct the administration of justice, nor does it make clear that the publication, in its effect, went beyond reference to a judicial order already made."

And so for this petition and evidence at Bar. It is not even contended that this petition avers that any juror was ever approached, that any juror was ever communicated with, that any juror was even conscious that he was being observed. There can be no reason given to characterize as illegal or unlawful any single act of the respondent, Day, as charged in this petition against him, or as shown in evidence.

How can anything influence one, which does not approach within the field and purview of any of his senses? How could a juror have been in any way affected by any deportment of others, no matter how far reaching it otherwise might be, providing it never

came within the field of his consciousness and never was exhibited to any of his senses? How can it be that there is that which even tends to interfere with the function of a juror, so long as there is nothing within the field of that juror's senses or of his consciousness that acquaints him with any such effort or purpose, and especially when no such purpose anywhere existed?

Unfortunate it is, that the phrase "contempt of court" ever got to be the terminology for characterizing the offense against the functions of Courts which can be met in a summary way; because that phraseology is so indefinite as itself to have occasioned many unfortunate instances in which judges, on account of insolence towards them personally while not in the discharge of their functions, have felt, and felt honestly, that they possessed the power and were required to exercise it in a summary way, which Appellate Courts have consistently condemned. If the phrase "Contempt of Court" could be wiped out of the books and "obstructing the administration of justice" substituted in its stead, the field would be very clear. Where else, except in that field, is there room for such a summary power for courts? Why should it exist unless there has occurred that which has obstructed, the administration of justice? The violation of a court order obstructs the administration of justice because it stops the flow of the judicial power in the direction and to the end that the court has released it. The failure of an officer of the court to do his duty obstructs or impedes or interferes with the administration of justice. What necessity is there for the exercise of summary power in any other field? There is none, and neither the people nor Congress would tolerate or submit to it, and it was never the law.

A very striking case, is Doniphan versus Lehman, 179 Federal 173. The syllabus states:

> "Neither the taking of a deposition to be used in a Federal Court in another State, in pursuance of a conspiracy to impose upon the Court, nor the filing and publication of such deposition, is a misbehavior in the presence of the Court, or so near thereto as to obstruct the administration of justice, punishable as a contempt under Revised Statute, Section 725; but to constitute such contempt the deposition must have been used or offered in evidence."

The Court said:

> "The affidavits show that the conspiracy alleged was entered into between Doniphan and Lehman in the States of Kentucky and New York, and the overt acts in furtherance of the conspiracy were committed in those states. The acts committed in Kentucky consisted in the sale and delivery of property and the payment of money, and it is not claimed that those acts, however reprehensible, constitute any contempt of court. The only acts in New York in furtherance of the conspiracy consist in the taking of a deposition by the complainant, Doniphan, before an officer selected by agreement of the parties and sending the same by mail to the Clerk of the Court in Indianapolis, Indiana, who received and filed the same to be used on the trial of the suit. Since the deposition has been filed, it has been published; but at whose instance it is not shown. Do these acts constitute a contempt of this Court?"
>
> "This statute embraces three classes of cases in which the Court is given jurisdiction to punish contempt: (1) Misbehavior of any person in the presence of the Court or so near thereto as to obstruct the administration of justice; (2) misbe-

havior of the officers of the Court in their official transactions; (3) Disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the Court. The facts set out clearly do not present a case for contempt under the second and third clauses of the above section. If a contempt is disclosed it is under the first clause, making misbehavior in the presence of the Court, or so near thereto as to obstruct the administration of justice a contempt. A conspiracy to misbehave in or near the presence of the Court for the purpose of obstructing the administration of justice does not of itself constitute a punishable contempt."

Just as at bar, even if it were alleged that there was a conspiracy between Sinclair, Day and the Burns Agency, to obstruct the administration of justice, that is no contempt of Court; if there was such, it may be punished by indictment under the second section of the Act of 1831. The mere forming of the conspiracy is not a contempt of Court. The Court proceeds:

"It is the act of misbehavior in or near the presence of the Court, and not the conspiracy, which constitutes a contempt. If the complainant, Doniphan, and the defendant, Lehman, formed the alleged conspiracy they committed no contempt in so doing. And if they have committed overt acts in furtherance of the conspiracy, they have not made themselves amenable to punishment for contempt unless their acts constitute misbehavior in or so near the presence of the Court as to obstruct the administration of justice."

"The taking of a deposition in New York for the purpose of furthering the conspiracy can not be held to be misbehavior in or so near the

presence of the Court as to obstruct the administration of justice."

U. S. vs. Carroll, 147 F. is interesting: it deals with the very subject of an effort to bribe a juryman. Says the syllabus:

> "A bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a federal court, did not obstruct the administration of justice, so as to constitute a contempt, * * * the act done by the accused must naturally and directly tend to such obstruction."

The material averments of the affidavit of the Assistant United States Attorney in Carroll's case set out that on—

> "the 11th day of August, A. D. 1906, at the City of Helena, in said district of Montana, corruptly endeavored to impede the due administration of justice in the case of the United States v. Joseph T. Carroll, now pending in the District Court of the United States, in and for the district of Montana, in the following manner, to wit: That the said William Carroll on the 11th day of August, A. D. 1906, approached one George B. Hopkins, a resident and citizen of the city of Helena, state and district of Montana, and handed the said George B. Hopkins, a paper containing a list of the names of the jurors impaneled to try said cause, and asked the said Hopkins if he was acquainted with A. Wiegand, one of the members of said jury, and that if he had any other friends on said jury to use his influence with them for the benefit of said defendant, or words to that effect; and also stated to said Hopkins that he had other lists that he was handing around."

Said the Court:

> "It is, however, a principle very well settled that accusations for contempt, especially where of criminal import, must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense, including the criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts." • • •
>
> "Now the question resolves itself into whether this demeanor on the part of Carroll tended in any manner to obstruct the administration of justice. I have been referred to but one case having a direct bearing upon the condition involved. This I will allude to later. In treating of section 5399 a cognate statute to section 725, the court in United States v. Bittinger, 24 Fed. Cas. 1149, No. 14,598, in its instructions to the jury, says of the first clause: 'It contemplates a case in which an attempt is made to directly interfere with a witness, and to improperly and illegally influence him.' And of the second clause: 'It will be necessary for you to find that the defendant, Bittinger, did some act or acts which obstructed or impeded the due administration of justice.' Thus giving the impression that the act complained of must have the direct effect, within itself to obstruct or impede the administration of justice.
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> "In a much later case, United States v. Seeley, 27 Fed. Cas. 1010, No. 16,248a, the court discusses directly the import of the words 'obstruct' and 'impede,' as employed in the same section 5399. It says:
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> > 'To "obstruct," independent of the acceptation the word has obtained in the criminal law, would seem to stand *ex vi termini* a direct

and positive interposition, which prevented, or tended to prevent, the action of the officer or court in respect to a matter then to be proceeded in. "Impede" must necessarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the Legislature to give these terms an application only to direct acts of violencee or menace is inferrible from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, etc., by threats or force, would necessarily imply the efforts to put forth some act, which in its natural, if not necessary, consequence, must be attended with an obstruction, and with a forced and compelled interruption of further progress in the administration of justice.'

"Thus again indicating that the act put forth must itself have the direct and natural effect to obstruct or impede. If this be so, then the act of Carroll in endeavoring to get Hopkins to do something for him, or his brother, with the jury, which Hopkins never consented to, could, of itself, have no direct or sensible effect to obstruct or impede the due administration of justice. It was an endeavor which in no way reached or influenced the jury, and, therefore, tended in no way to impede justice or the administration thereof. If the endeavor had been directly with the jury or a member thereof, then it would have reached the mark; but an effort to get a third person to act, who declined, stops short of a misbehavior that is effective to obstruct, or impede justice, or to hinder its administration."

The Supreme Court has definitely ruled upon the very question in the case of Hudgings, the 249 U. S. on page 378. In that case the opinion was delivered by Chief Justice White, the facts were as follows: There was, a witness on the witness stand in a trial which was proceeding. The judge becoming of opinion that the witness was committing perjury, instantly ordered him attached and dealt with as for contempt of court. He said:

> "This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife. * * *
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> "And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the Court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you pression, 'I do not remember.' "

The principal quality of the Hudgings case is in the determination of that much debated question whether and when a court has power to punish perjury as for a contempt of court; the judge of the trial court committed Hudgings to jail, because he was satisfied from what occurred in his presence that this witness on the witness stand before him was guilty of perjury; but nevertheless on habeas corpus the Supreme Court held that the judge had exceeded his power, *because there was nothing to show that the perjury had had the ef-*

fect of obstructing the administration of justice. The Chief Justice said:

> "That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the Court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was wilfully refusing to testify truthfully, that is, was committing perjury."

Many of the Bar have thought that the commission of perjury alone, no matter if it had no effect on the outcome of the case, was contempt of court until corrected by this opinion of the Supreme Court of the United States.

> "Whether, then power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury" (see a number of authorities). "This being true we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both
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> "Existing within the limits of and sanctioned

by the Constitution, the power to punish for contempt committed in the presence of the Court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end, that means appropriate for the preservation and enforcement of the Constitution may be secured.

"*An obstruction to the performance of judicial duty* resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, *it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted*—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law *the further element of obstruction to the court in the performance of its duty*. As illustrative of this, see United States v. Appel, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evidence, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testi-

> mony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

And so it was concluded that even when the misbehavior was in the presence of the court that there must be charged and must be proven that that misbehavior was "an obstruction to the performance of a judicial duty" or no contempt of court was shown or proven.

In the trial below it was neither claimed by the District Attorney nor considered by the Court that there existed any evidence which tended to prove that any juror was approached or communicated with, or that anyone had any purpose of approaching or communicating with any juror, or that anyone attempted or endeavored to approach or communicate with any juror, or that any juror ever suspected that he was being observed by the Burns operatives. The entire undertaking produced no effect upon the mind of any juror, no knowledge of any part of the undertaking was ever intruded into the mind of any juror, the entire tribunal, court and jury, were utterly ignorant and unconscious of any part of the undertaking, so that there could be no pretense even, of an obstruction to the administration of justice. For the foregoing reasons, there was error in overruling the motion to dismiss the petition, error in overruling the motion to discharge the rule at the close of the Government's evidence, and error in overruling the like motion at the conclusion of all the evidence.

ERROR IN THE EXCLUSION OF EVIDENCE.

Sixteen witnesses subpoenaed from throughout the United States, were actually produced in court and placed upon the witness stand, amongst them two former Chiefs of the Bureau of Investigation of the Department of Justice whose immediate superior was the Attorney General of the United States himself. (R. 788-789.) All of these witnesses either were at the time or had been in the employ of the Bureau of Investigation of the Department of Justice. They were offered to prove that for a time so long as that the memory of man runneth not to the contrary, it had been the continuous and unbroken custom of the United States, the United States District Attorneys throughout the United States, the Bureau of Investigation of the Department of Justice of the United States, and the Attorney General of the United States through the Bureau of Investigation, in the trial of criminal cases in the Federal Courts, to keep under surveillance individual members of trial juries, entire jury panels sitting in criminal causes, and keep them under constant surveillance during all of the time they were not in actual attendance upon the Court, to observe them as closely as possible when they were abroad from the Court room from their places of business and from their residences and watch their residences after they had gotten home at night, and that this was done when there was no reason to suspect at the time of the surveillance, any lack of integrity upon the part of any juror or to suspect that any person was endeavoring to improperly approach them.

That the Attorneys General of the United States throughout that time knew and approved of the cus-

tom, themselves received reports in person, and themselves at times directed such surveillance to be had (R. 718-715-ETSEQ): further, that the same practice had prevailed in the District of Columbia, and that at the direction of the very District Attorney, who was engaged in the prosecution at Bar, Major Gordon, not only was an entire jury panel kept under surveillance by the Department of Justice during the trial, but also that that surveillance was extended to every witness and every lawyer for the defense. And further offered to prove (R. 722) that the Department of Justice had shadowed and kept under surveillance Federal Judges at the direction of the Attorney General of the United States himself; that at the direction of the Attorney General himself, a Justice of the Supreme Court of the District of Columbia was kept under surveillance for a period of four months (R. 726). All of this evidence was excluded. It was re-offered after the decision of the Court and in mitigation of sentence, and again excluded (R. 855). The offer of this evidence was upon two theories: First, That an unbroken custom, of interpretation by the Attorneys General and the Department of Justice of the Statutes which clothe that Department with its power establish by this unbroken custom a "law of usage" as it were; established for the United States a "common law" for the United States upon this point; a law which made the surveillance of juries lawful, if it was not already lawful independent of the custom. The second reason was, that the evidence should be heard in mitigation of sentence. These reasons in their order. First, the Government of the United States is unique in that it is not a "sovereignty of the soil," and as a sovereignty has no laws which adhere in and to

the soil. It had at its inception no "common law," no law save the Constitution and Acts of Congress made in pursuance thereof and it has no "common law" of its own yet, and never can have, unless such a common law is established by the "usage and custom" of its several Departments of Government. Is it possible that since the existence of the Federal Government no "law of usage" no "common law" for it has been established by the practices and customs of its several Departments? Their powers exist only by virtue of Statutes, and can it be that in matters of detail in the execution of powers specifically granted, the various departments throughout their existence have not by their "custom" established as law for certain details implied powers not expressed by any Statutes?

> "The United States as a Federal Government, have no common law; and consequently, no indictment can be maintained in their courts, for offenses merely at the common law." (U. S. v. Worrall, 2nd Dall. 394.)
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> "To attempt to regulate by law the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance of the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every part of the government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits; and no change of such usages

have a retrospective effect, but must be limited to the future." U. S. v. Macdaniel, 7th Peters, 1.

By this process the Department of Justice has established "by common custom and usage of the United States itself" the legality of the surveillance of juries.

In U. S. v. Birdsall, 233rd U. S. 223, the Supreme Court of the United States in considering how "a common law" might be established for a department of the government said, (231) "Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and affixed the duties of those engaged in its activities."

It is to be remembered, that the construction which the Department of Justice has from time immemorial given to the Statutes which grant power to that department, has been that the surveillance of juries was legal and proper and sanctioned by the statutes conferring power on that department. The lawfulness and legality of surveillance for proper and pure motives,—surveillance alone,—has never been questioned until the filing of the petition at Bar, a petition which the District Attorney as above pointed out, grounded upon his belief that the violation of a penal statute alone was contempt of court. Upon the point of the effect of Departmental custom in the interpretation of statutory powers, the Supreme Court of the United States in St. Paul R. R. v. Phelps, 137 U. S. 36, said:

"Had any such case been presented when the language of the statutes under consideration was

> dubious and open to different interpretations, the established construction of them by the department charged with their execution would have very great force and generally a controlling one in the formation of the judgment of this court."

Why should not the custom and usage of the United States itself "from time whereof the memory of man runneth not to the contrary" establish a common law? The entire field and scope of chancery and equity jurisdiction was established by no other power save the custom and usage of officers of the King, without a word of parliamentary or statutory legislation upon the subject. The "common law" itself is characterized by the very quality that it exists independent of statutory legislation, established only by "custom and usage."

For the foregoing reasons, the court below seems to have erred in the exclusion of the evidence which was offered.

THE EVIDENCE SHOULD HAVE BEEN RECEIVED IN MITIGATION.

As above indicated the same evidence was re-offered in mitigation of sentence (R. 855). There may have been a time in the history of the law when the right to offer evidence in mitigation of sentence for contempt of court was debatable; that time has passed; for since and by the decision of the Supreme Court of the United States in Cooke v. United States, 267 U. S. 517, that question is laid at rest. The Court said, (537)

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised

of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, *and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.*"

Elaboration of argument is therefore superfluous. The decisions of the Supreme Court need no other reasoning than its own to sustain them.

OTHER EVIDENCE EXCLUDED

Other rulings excluding evidence offered by the respondent Day, will now be noticed. The evidence was offered on two theories, first, to show good reasons in the mind of Day to be apprehensive that effort would be made to corrupt the Sinclair jury, as bearing upon the purity of his motives in taking part in the surveillance. Second, as showing the existence as matter of fact, of a reason which justified the surveillance. Mr. Day had testified (R. 818) that he had spent a number of years in Russia, and had been offered by the Government concessions for the operation of certain oil fields and that Mr. Sinclair had joined with him for the development of one of these concessions known as the Baku Oil Fields. That the Russian Government called upon them to take over certain of these valuable territories which were not covered by their concessions, which Mr. Sinclair refused to do. At this point in Mr. Day's testimony, objection was interposed and it was offered to prove (R. 819) as showing the condition of Mr. Day's mind at the time he employed the Burns agency, that the Russian Government required of them

to develop their concessions and in so doing to interfere with and actually to confiscate private interests, which under the direction of Mr. Sinclair they refused to do. That immediately their competitors in the oil business knowing of that, made application and exerted influences which resulted in the withdrawal of these concessions by the Russian Government from the Sinclair interests and the conferring of those concessions upon their competitors, who went ahead and did what they (Sinclair and Day) refused to do, that is to say, in the exercise of the power conferred under the concessions, despoil private property and private interests. The proffer of proof is extended on page 820. Mr. Day testified (820), "I went to Europe continually for the Sinclair interests, Italy, France, Spain, England, all the Northern countries and southern countries on the question of concessions, foreign policy, exchanges, one thing and another. I came back to America in August, 1927. Meanwhile my friendship with Mr. Sinclair had grown. My contact with him since August 1st was to report to him fully on European conditions, on his different companies in which he was interested. I was in close daily contact with him. I opened his general mail that came in. He has a great deal more than any man can take care of and I believe I am confidentially trusted and I am allowed to do it. I answer a great deal of it. His mail came in in every condition, a large portion opened, unsealed before it was delivered to our offices and it was apparent that it had been opened. I reported that fact to Mr. Sinclair."

Q. Were you or not followed by unidentified people that you did not know?

Objection to this question was sustained and the following proffer of proof made.

> (821) "that he was continually followed on the street, up about clubs, and going to and from his home, by men whom he did not know by name or by identity, but whose physiognomy and physical identity he knew because of the fact that the same man would follow him for periods of a few days, and then another man who had followed him before, took up the following and followed him again for a few days; and that this occurred innumerable times, and he reported it to Mr. Sinclair; that he has observed on numerous occasions continuously when he was abroad with Mr. Sinclair, Mr. Sinclair and himself were both followed continuously, in New York, in Washington and other cities, about hotels and clubs and business places, and about their homes." "* * * that those facts were in his mind when he employed the Burns Agency at Mr. Sinclair's direction. * * * That he believed that some enemies of theirs, or unidentified persons whom he did not know, might undertake unlawfully to tamper with the jury and produce an unlawful and improper verdict."

This testimony was all excluded under exceptions. Mr. Day testified that when he employed the Burns Agency, he knew that W. J. Burns had been for many years chief of the Bureau of Investigation of the Department of Justice of the United States. He was asked:

> Q. On that day did you know whether or not it was the custom of the United States District Attorney of the City of New York to shadow through representatives of the Department of Justice jurors engaged in the trial of criminal cases in the United States courts in that city?

Objection to this question was sustained, an exception noted and the proffer of proof made (R. 822).

He was further asked (R. 822):

> Q. At that time was it or was it not a matter of public common knowledge in the City of New York that the custom of the United States District Attorney in the trial of criminal cases in the United States courts in the City of New York was to shadow juries after they were impanelled and sworn, and during the trial?

Objection to this question was sustained, exception noted and the proffer of proof made.

The following was asked:

> Q. Did you or did you not know of instances in New York, through public discussion, in which jurors had been followed, jurors empanelled in the United States Courts there, by representatives of the Government and the Department of Justice, during the trial?

Objection to this question was sustained, exception noted and proffer of proof made. (R. 822)

Mr. Day testified (R. 835) that in talking with Mr. Sinclair he spoke about an incident in the Mayflower Hotel when "I saw a certain man."

> Q. Will you relate that incident?

The question was objected to, objection sustained, exception noted, and it was offered to prove that if the witness were permitted to answer he would testify that this man was the man who had been in the employ and was in the employ of certain of their competitors, and who, to the mind of the witness, was

known in the parlance of the street as one who did the "dirty work" for them. (R. 836)

The foregoing items of evidence were revelant on many grounds in the first place, the petition by averring the purpose which actuated Mr. Day in taking part in the surveillance put the condition of his mind in issue; and the condition of his mind being in issue he had a right to show the Court the facts and knowledge which his mind contained so that it could make up its mind what its real purpose was. Moreover, according to the decisions of the Supreme Court above cited, even though the petition had not directly put in issue the condition of his mind, he had the right on a charge of contempt of court, to testify that his purpose was innocent, in mitigation of sentence; and further, to portray to the Court the facts which were present in his mind indicative of purpose, so that it, the Court, might judge for itself what real purpose actuated him.

What reasons will, or can be advanced for the exclusion of this evidence in mitigation of sentence, are inconceivable to the undersigned in the case of any man, and especially in the case of Mr. Day. His identity was well established; a man well and favorably known on both sides of the Atlantic; well known to and in intimate association with the best men in the Nation's capital, who hurried to the court to speak upon his character (R. 836-837) a man, who at the outbreak of the World's War, although not subject to draft, abandoned his own business interests and put himself at the disposal of his country; (R. 817-818) and who, on account of his vast foreign acquaintanceship and knowledge of the business of importing was immediately put in charge of the purchase of all the

food stuff for the American Army in France and who actually purchased the first thirty-five requisitions which were sent to this country on food stuff, prior to the inauguration of the Food Bureau in Washington. (R. 818) When this Bureau was organized he came to Washington and offered his services to Mr. Hoover, was sent to France to report to General Headquarters for miscellaneous work, was for a time aide to General Rogers, General in charge of the Headquarter's Corps, from there he was sent as chief of Liaison to the front in various capacities, then returned to the United States at the request of the French Government for the purpose of executing a special mission here; after the war was over honorably discharged with the rank of Major, and received the legion of honor with Croix de Guerre from the French Government. And yet the trial Court, after hearing from December 5th, 1927, until February 21st, 1928, evidence which did no more than prove the allegations of the answers of the respondents, and after itself having spent three months with the assistance of counsel in an effort to reach a conclusion upon whether Mr. Day had violated any law whatever in imposing sentence, confronted him with this (R. 859)

> "The Court: I will say to you, Mr. Day, that under the evidence in this case that you showed a loyalty to a friend and associate greater than your loyalty to the law of the land, and loyalty in friendship, I think, is a splendid virtue. But there is a higher loyalty than that. It is the loyalty *that a man owes to the institutions of his country; a loyalty to its laws; you have violated those laws.*"

Thereby establishing, that there was a fixed conviction in the mind of the Court that Mr. Day had intentionally and purposely violated the laws of his country and should be punished accordingly; and yet the court had consistently excluded all the evidence which Mr. Day had offered tending to prove the exact contrary and which, if it had been received, would have exonerated him from the very accusation for which the court condemned him. Other errors of law in the admission and exclusion of evidence are expected to be discussed in the briefs of other respondents and for that reason will not be repeated here; it is enough to say however, that with respect to all such rulings, Mr. Day also objected and preserved the point by proper exception or of proof, as the case may be.

That the judgment below should be reversed is

Respectfully submitted,

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